Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CANADA, INC. AND MERCEDES-BENZ CANADA, INC.,

Petitioners,

v.

GEORGE JAYNES, ET AL.,

Respondents.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The District Court denied Petitioners' motions to dismiss for lack of personal jurisdiction in this putative antitrust conspiracy class action, but certified "a controlling question of law as to which there is substantial ground for difference of opinion" concerning the proper interpretation of Section 12 of the Clayton Act, 15 U.S.C. § 22 – the Clayton Act's extra-territorial or "worldwide service of process" provision. The Circuits are sharply divided on this question. Unlike nearly every other federal Court of Appeals that has been presented with this question, the First Circuit declined to address this pure question of law on interlocutory appeal.

The question presented is:

Does the second clause of Section 12 of the Clayton Act, 15 U.S.C. § 22 – the Clayton Act's "worldwide service of process provision" – permit district courts to exercise personal jurisdiction over corporate defendants absent any showing that venue exists under the first clause of Section 12 and based solely on the corporation's aggregate contacts with the United States as a whole, rather than contacts with the district or with the State in which that district court sits?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner and Defendant DaimlerChrysler Canada, Inc. ("Daimler Canada"), a corporation organized under the Canada Business Corporations Act, is a wholly owned subsidiary of DaimlerChrysler Corporation, a Delaware corporation that is wholly owned by DaimlerChrysler Motors Company, LLC, a Michigan limited liability company that is wholly owned by DaimlerChrysler North America Holding Corporation ("DC NA"), a Delaware corporation. DC NA is a wholly owned subsidiary of DaimlerChrysler AG, a publicly-traded stock corporation organized under the laws of the Federal Republic of Germany.

Petitioner and Defendant Mercedes-Benz Canada, Inc. ("Mercedes Canada"), a corporation organized under the Canada Business Corporations Act, is a wholly owned subsidiary of DC NA.

Respondents George C. Jaynes, Jane A. Jaynes, Cathy-Ann Accomando, Richard Jaffe, Lisa Saizon, Daniel E. Herschberg, Deborah McComb, Andre Rodriguez, Barry Cushner, Jeffrey Coe, Bruce B. Belodoff, Lisa Baade, and Perry Sadoff are natural persons.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners DaimlerChrysler Canada, Inc. and Mercedes-Benz Canada, Inc. (collectively, "Daimler/Mercedes Canada") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS AND ORDERS BELOW

The First Circuit's August 3, 2004 judgment declining to accept the issue certified by the District Court for interlocutory appeal under 28 U.S.C. § 1292(b) (Pet. App. 1a) is unreported. The District Court's March 4, 2004 opinion and order denying Daimler Canada's motion to dismiss for lack of personal jurisdiction and deferring a ruling on Mercedes Canada's motion to dismiss for lack of personal jurisdiction pending jurisdictional discovery (Pet. App. 2a) is reported at 307 F. Supp. 2d 145. On April 20, 2004, the District Court amended its March 4, 2004 order to certify, under 28 U.S.C. § 1292(b), "a controlling question of law as to which there is substantial ground for difference of opinion" for interlocutory appeal to the First Circuit. That April 20, 2004 order (Pet. App. 26a) is unreported.

JURISDICTION

The First Circuit entered its judgment on August 3, 2004. On October 20, 2004, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including December 1, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST., amend. V.

Section 12 of the Clayton Act, ch. 323, 38 Stat. 730 (1914) provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22.

STATEMENT OF THE CASE

The second clause of Section 12 of the Clayton Act provides for the assertion of personal jurisdiction over corporate defendants through extraterritorial, worldwide service of process "wherever [such defendants] may be found." 15 U.S.C. § 22. This case concerns whether this provision found in the second clause of Section 12 may be shorn from the first part of the sentence to which it refers, and then combined with general venue provisions that are broader than the special venue provision found in the first clause of Section 12. Specifically, this case presents the question whether the second clause of Section 12 may be combined with the alien venue statute, which provides that "[a]n alien may be sued in any district," 28 U.S.C. § 1391(d), so as to render foreign corporations, such as Petitioners Daimler/Mercedes Canada, amenable to suit in *any* judicial district of the United States, irrespective of whether those corporations have any contacts with that district or with the State in which that district court sits.

1. In 2003, Petitioners Daimler/Mercedes Canada, along with some of their Canadian corporate co-defendants,[1] moved under Federal Rule of Civil Procedure 12(b)(2) to dismiss for lack of personal jurisdiction the twenty-six cases that had been transferred by the Judicial Panel on Multidis-

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[1] These other co-defendants include Toyota Canada, Inc. ("Toyota Canada"), Nissan Canada, Inc. ("Nissan Canada"), BMW Canada, Inc. ("BMW Canada"), and the Canadian Automobile Dealers Association ("CADA"). Pet. App. 3a.

trict Litigation to the United States District Court for the District of Maine for pretrial proceedings. Pet. App. 3a. The complaints in these cases, brought by "[n]ew motor vehicle purchasers and lessees," basically allege that "American and Canadian car manufacturers, distributors, dealers . . . and dealer associations conspired to prevent a discount distribution channel from operating in the United States" by prohibiting the "entry into the American market" of "cheaper Canadian versions of various models." Pet. App. 2a.[2] When the District Court ruled on Petitioners' motions to dismiss for lack of personal jurisdiction, Respondents' complaint stated only a federal-law claim under Section 1 of the Sherman Act, 15 U.S.C. § 1.[3]

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[2] Plaintiffs eschewed reliance on the long-arm statute of any State, but also did not attempt to establish personal jurisdiction under Fed. R. Civ. P. 4(k)(2)'s provision for "claims arising under federal law" against a defendant "who is not subject to the jurisdiction of the courts of general jurisdiction of any state." Pet. App. 3a. Instead, Plaintiffs simply asserted the existence of *national* minimum contacts in very broad terms. The District Court balked at Plaintiffs' suggestion that general jurisdiction existed because "the defendants benefited from international agreements designed for the automotive industry such as NAFTA and Auto Pact; substantial automotive trade goes on between the United States and Canada; and complex corporate structures camouflage the reality of United States trade." Pet. App. 8a (citation omitted). The District Court did, however, accept the contention that specific jurisdiction existed based only on a *prima facie* showing that a defendant "engaged in a two-channel distribution system by which vehicles they manufacture flow into" any part of "the United States" "at higher prices; while the same vehicles, distributed in Canada at lower prices, are forbidden export to the United States." Pet. App. 16a-17a; *see infra*, at 5.

[3] After the District Court ruled that injunctive, but not monetary, relief would be available under Respondents' Sherman Act claim, Respondents amended their complaint "to add various state law claims" "under state antitrust statutes, consumer protection statutes and the common law of unjust enrichment" "that would allow a monetary recovery." Pet. App. 28a, 30a.

2. On March 4, 2004, the District Court denied Daimler Canada's motion to dismiss for lack of personal jurisdiction, and deferred ruling on Mercedes Canada's similar motion pending jurisdictional discovery. Pet. App. 24a.[4]

After stating that "[t]he cases are unanimous" that "[t]he clause before the semi-colon" in Section 12 of the Clayton Act "is a venue provision" and "[t]he clause following the semi-colon is a [personal] jurisdiction/service of process provision," Chief Judge Hornby stated that "courts have struggled for years with the meaning of the second clause's limiting phrase 'in such cases'":

> Does "such cases" mean antitrust lawsuits against a corporate defendant? Or does it mean only antitrust cases against a corporate defendant that meet all the criteria of the first clause, *i.e.*, where venue is established on the criteria set out there? The question is important because there is a separate venue statute that is broader for alien defendants, permitting venue over alien defendants in any district. See 28 U.S.C. § 1391(d). *If plaintiffs can use the alien venue statute in combination with section 12's service of process provision, they can sue an alien corporate defendant in federal court anywhere in the United States, subject to constitutional limitations, and serve that defendant anywhere in the world. . . .*

Pet. App. 4a-5a (emphases added).

The District Court noted that "the First Circuit has not spoken on the issue," and also recognized a near-even split of the Circuits that have. Pet. App. 5a (citing *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288 (3d Cir. 2004); *GTE New Media Servs. v. Bellsouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000); *Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1413 (9th Cir. 1989)). Finding the reasoning

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[4] The court also denied the Rule 12(b)(2) motion brought by CADA, but granted the 12(b)(2) motions brought by Nissan Canada, BMW Canada, and Toyota Canada. Pet. App. 3a.

of the Third and Ninth Circuits "persuasive," Chief Judge Hornby "conclud[ed] that the second, worldwide service, clause of section 12 is available in antitrust cases generally against corporate defendants, and that a plaintiff can use it in conjunction with the alien venue statute." Pet. App. 6a.

The court then eschewed "the traditional Fourteenth Amendment due process analysis that deals with the power of the individual states," and undertook an aggregate nationwide minimum contacts analysis that it regarded as comporting with the Fifth Amendment. Pet. App. 6a-7a (citations omitted) (evaluating "whether a particular defendant has sufficient contacts with the United States as a whole to justify the assertion of federal court jurisdiction over it"); *see also* Pet. App. 7a (acknowledging that "[t]he Supreme Court has not spoken to this issue").

Applying this test, the District Court found that Daimler Canada had sufficient minimum contacts with the United States as a whole, given the *prima facie* "evidence of targeted distribution and non-export agreements" that allegedly "ensure[d] that only the higher priced version of the same product can be sold to American consumers." Pet. App. 19a.[5]

The District Court "defer[red] action on [Mercedes Canada]'s 12(b)(2) motion to dismiss for lack of personal jurisdiction pending jurisdictional discovery," finding that such "discovery is warranted, given . . . that [Mercedes Canada]

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[5] The court made such a finding even though it is undisputed that Daimler Canada does not export any of its vehicles to the United States; rather, a separate but related corporate entity actually purchases the vehicles from Daimler Canada and then imports them into the United States. Pet. App. 18a. Moreover, the vehicles that are imported into the United States are not alleged to have been the source of the harm to Plaintiffs. Instead, Plaintiffs assert that they were harmed by vehicles that were not permitted to be exported to the United States.

does sell some vehicles for distribution in the United States." Pet. App. 22a.[6]

3. The District Court certified its ruling on Section 12 of the Clayton Act for interlocutory appeal under 28 U.S.C. § 1292(b) to the First Circuit on April 20, 2004. Pet. App. 26a-27a. Chief Judge Hornby determined that his March 4, 2004 order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and there is "disagreement among the Circuits." *Id.* at 27a. Reiterating his earlier order, Chief Judge Hornby stated that "[t]he First Circuit has not addressed the issue." *Id.*

He further explained that "[a]n immediate appeal from the Order of March 4, 2004 . . . may . . . materially advance" "the ultimate termination of the complex multidistrict litigation now before this court" "as to these two Canadian parties [Petitioners Daimler/Mercedes Canada], because if they are successful on their appeal of this issue, the litigation will terminate as to them." Pet. App. 27a.

5. On August 3, 2004, a panel of the First Circuit (Torruella, Selya, and Howard, JJ.) entered its judgment declining to hear the interlocutory appeal that had been certified by Chief Judge Hornby. In an order signed by an Appeals Attorney on behalf of the Clerk of the Court of Appeals, the First Circuit tersely stated:

> We decline, in the exercise of our discretion, to accept this issue for interlocutory appeal under 28 U.S.C. § 1292(b).

Pet. App. 1a.

6. On October 8, 2004, Petitioners timely filed an application for an extension of time to file a petition for a writ of certiorari. Justice Souter granted that application on Octo-

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[6] The District Court has yet to render a dispositive ruling on Mercedes Canada's Rule 12(b)(2) motion to dismiss, as jurisdictional discovery is still ongoing.

ber 20, 2004, extending the time in which to file the instant petition to and including December 1, 2004.

REASONS FOR GRANTING THE WRIT

Review is warranted in this case to provide the lower courts with much-needed guidance over an important and recurring question of federal antitrust law. A clear, well-developed, and deep split exists amongst the Circuits concerning the proper interpretation of Section 12 of the Clayton Act. Moreover, the view adopted in this case has significant constitutional and international comity implications when foreign corporations, such as Petitioners, are sued under United States antitrust laws and under a wide variety of "pendent" state-law claims in a federal judicial district and State with which they have no contacts.

The kind of patently unfair and arguably unconstitutional outcome that has resulted in this case will continue to arise in the future if courts, like the District Court in this case, are permitted to follow the Ninth Circuit's lead in tearing apart the two clauses comprising Section 12's single sentence and conjoining the second worldwide-service-of-process clause with general venue statutes such as the alien venue statute (28 U.S.C. § 1391(d)), which authorizes venue in any federal judicial district. Such a Frankenstein-like operation disconnects the second clause of Section 12's far-reaching extraterritorial-service-of-process provision from the first clause's special venue provision and renders the first clause wholly superfluous.

This Court should not defer review until the First Circuit has entered a final judgment in this case. Nearly every Circuit to have addressed the pure question of law certified by the District Court in this case has done so on *interlocutory appeal*. *See infra*, at 27-28 (citations omitted). Immediate appellate review is warranted because the proper interpretation of Section 12 of the Clayton Act involves questions of personal jurisdiction and venue – defenses that are designed to protect defendants from the burden of having to defend suit in a forum with which they do not have sufficient con-

tacts or in which it would be unfair to require the defendants to appear generally. To require Petitioners to endure a costly trial and related proceedings in this multi-million-dollar lawsuit and to overcome the pressure to settle such a high-stakes lawsuit in the interim before their defense of lack of personal jurisdiction can be vindicated would inflict upon Petitioners the very damage and injury against which the defense of lack of personal jurisdiction was designed to protect.

I. A DEEP AND LINGERING CONFLICT OF AUTHORITY PERSISTS AMONGST THE COURTS OF APPEALS REGARDING THE PROPER INTERPRETATION OF SECTION 12 OF THE CLAYTON ACT, WHICH RAISES SIGNIFICANT CONSTITUTIONAL AND INTERNATIONAL COMITY CONCERNS

The question whether the worldwide-service-of-process clause can properly be shorn of the rest of the sentence of which it is a part and combined with general venue statutes such as 28 U.S.C. § 1391(d) to authorize antitrust plaintiffs to select any district court anywhere in the United States in which to proceed against foreign corporations is ripe for, and deserving of, this Court's review at this time.

A. The Circuits Are Split On How To Interpret Section 12 of the Clayton Act.

There is at least a 3-2 split amongst the Circuits regarding whether the special extraterritorial service of process language in Section 12 applies to cases that do not satisfy the venue requirements of that same provision. This circuit split has been noted by at least two other Circuits as well as in academic commentary, and it has bred confusion and divergent outcomes amongst district courts across the country.

1. The interpretation of Section 12 left intact by the First Circuit was largely pioneered by the Ninth Circuit, which held in *Go-Video, Inc. v. Akai Electric Co., Ltd.*, that antitrust plaintiffs may serve process under the second, worldwide-service-of-process clause of Section 12 "in cases where

venue is not established under that section but lies properly under 28 U.S.C. § 1391(d)." 885 F.2d 1406, 1407-13 (9th Cir. 1989). Rejecting the argument "that section 12 of the Clayton Act must be read as an 'integrated whole,' requiring every antitrust plaintiff to satisfy the section's venue provision if it is to avail itself of its worldwide service of process authorization," Judge Reinhardt adopted an interpretation of the statute that he candidly acknowledged would render "the venue provisio[n] of section 12 'wholly redundant.'" 885 F.2d at 1408, 1413 (quoting 15 Wright & Miller, § 3818 at 110). He did so because, "as a general matter, courts have interpreted special venue provisions to supplement, rather than preempt, general venue statutes." 885 F.2d at 1409 (citing 15 Wright & Miller, *Federal Practice and Procedure*, § 3818 at 108-109 (1976)).

Judge Reinhardt relied specifically on this Court's decision in *Brunette Machine Works, Ltd. v. Kockum Industries, Inc.*, 406 U.S. 706 (1972), even though in that decision, "service of process" had already been validly effectuated "under [the applicable state] long-arm statute," and even though the patent statute at issue in *Brunette* did not, like Section 12, consist of two clauses linked together in the same sentence governing both personal jurisdiction and venue. 406 U.S. at 706-07 (citing Ore. Rev. Stat. § 14.035 and 28 U.S.C. § 1400(b)); *see also In re Vitamins Antitrust Litigation*, 94 F. Supp. 2d 26, 30 (D.D.C. 2000) (explaining that "*Brunette* addresses the choice of venue where valid service already has been made," "whereas" cases such as *Go-Video* deal with "when Section 12's service provision is used as a basis for personal jurisdiction"). Judge Reinhardt also relied on "the purpose of the Clayton Act . . . to expand the reach of the antitrust laws and make it easier for plaintiffs to sue for antitrust violations." 885 F.2d at 1412-13 (citing *United States v. Scophony Corp.*, 333 U.S. 795, 806-08 (1948)).

Earlier this year, the Ninth Circuit extended its holding in *Go-Video* that Section 12's second clause may be used to effectuate extraterritorial service of process over a corporation without any showing that the corporation "is an inhabi-

tant" of "the judicial district," or "may be found or transacts business" in that district, as required by the first clause of Section 12. *See Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174 (9th Cir. 2004). Adhering to its earlier "refus[al] to read Section 12 as 'an integrated whole,'" the Ninth Circuit held that Section 12's second, worldwide-service-of-process clause may be used when Section 12's first clause has not been satisfied, even when 28 U.S.C. § 1391(d) is unavailable, as in the case of nonresident domestic corporations. 368 F.3d at 1177-80. In doing so, the Ninth Circuit invoked "the Clayton Act's legislative history" for the proposition "'that Congress viewed the questions of venue and service of process separately.'" *Id.* at 1178 (citing *Go-Video*, 885 F.2d at 1410). Judge William Fletcher reasoned as follows:

> The juxtaposition of the venue and service of process provisions in section 12, without more, does not convince us that Congress intended to make these concepts analytically interdependent, rendering a court's exercise of personal jurisdiction over an antitrust defendant dependent on the propriety of venue. Without a clear indication from Congress that it intended to do so, we will not blur the basic, historic difference between these discrete concepts and what is required for their satisfaction. We therefore hold that under section 12 of the Clayton Act, the existence of personal jurisdiction over an antitrust defendant does not depend upon there being proper venue in that court.

368 F.3d at 1179-80.

The Ninth Circuit is not alone in its steadfast refusal to read the single sentence constituting Section 12 as "an integrated whole." Earlier this year, the Third Circuit joined the Ninth Circuit in holding that: (i) "worldwide service of process authorized under Section 12 . . . upon foreign corporations is independent of the specific venue provision contained in that statute," and (ii) "a federal court's personal jurisdic-

tion over a foreign corporation in antitrust litigation may be predicated on the foreign corporation's contacts with the United States as a whole (national contacts analysis), rather than with the specific forum in which the court sits (local contact analysis)." *In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288, 290 (3d Cir. 2004).

Judge Rosenn began by explaining that Section 12 "consists of two separate clauses, the first relating to venue and the second concerning service of process and, therefore, personal jurisdiction." *Id.* at 293. He frankly acknowledged that "if there is no specific venue limitation in federal antitrust litigation involving a foreign corporate defendant, the defendant can be sued in *any* federal district court based on its aggregate contacts with the United States as a whole." *Id.* at 292 (emphasis added). Judge Rosenn found the prospect of such unrestrained forum-shopping by plaintiffs unproblematic. He agreed with those courts that have held that the phrase "in such cases" in Section 12's second clause refers to only part of Section 12's first clause (namely, the phrase "[a]ny suit, action, or proceeding under the antitrust laws against a corporation"), rather than the category of cases comprised by the entirety of Section 12's first clause. *See id.* at 293-97. He did so largely in reliance on the *Go-Video* Court's analysis, particularly its discussion of this Court's decision in *Brunette*. *See id.* at 295-97.

The one other appellate court to squarely join in this interpretation of Section 12 is the Eleventh Circuit. It did so, however, with little or no analysis, in *Delong Equipment Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843 (11th Cir. 1988), a case that predated the Ninth Circuit's decision in *Go-Video*. In *Delong*, the Eleventh Circuit, citing a footnote in one of its earlier decisions as well as a decision from the Northern District of Georgia, stated that "'the majority of courts considering the joint operation of the venue provisions of the Clayton Act and § 1391(b) have held that the Clayton Act's specific venue provisions do not "abolish or supersede the available districts mentioned in the general venue provisions of § 1391(b)."'" 840 F.2d at 855 n.16 (citing *L.A.*

Draper & Son v. WheelabratorFrye, Inc., 735 F.2d 414, 417 n.3 (11th Cir. 1984), and *Vest v. Waring*, 565 F. Supp. 674 (N.D. Ga. 1983)). On this basis, the Eleventh Circuit "conclude[d] that venue is established under the general federal venue statute" against the nonresident corporate defendant, which was properly served under "the nationwide service of process provision of the Clayton Act, 15 U.S.C. § 22." 840 F.2d at 855 n.15, 848.

In sum, the Third, Ninth, and Eleventh Circuits have squarely held that personal jurisdiction may be obtained in cases that do not satisfy the relevant state long-arm statute by using the worldwide-service-of-process provision found in Section 12's second clause, even though the defendant corporation is not an inhabitant of, nor may be found or transacts business in, the judicial district, as required by the venue requirements of Section 12's first clause.

2. Two other circuits have reached the opposite conclusion. The District of Columbia Circuit has explicitly rejected this "tortured interpretation of Section 12," and held that antitrust plaintiffs may not rely on the special worldwide-service-of-process provision found in Section 12's second clause without satisfying the venue requirements of Section 12's first clause. *GTE New Media Services Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1345, 1351 (D.C. Cir. 2000). Chief Judge Edwards cogently explained the interrelationship of the two halves of the single sentence that constitutes Section 12:

> The language of the statute is plain, and its meaning seems clear: The clause before the semi-colon relates to a supplemental basis for venue in actions under the Clayton Act; the clause after the semi-colon relates to nationwide service of process in antitrust cases; and invocation of the nationwide service clause rests on satisfying the venue provision.
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> . . .
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> In *Go-Video*, the Ninth Circuit rejected the argument that Section 12 must be read as an "integrated

> whole," even though the reference to serving process "in such cases" clearly seems to require that the preceding clause's venue requirements be established before nationwide service can be authorized. The court reasoned that "as a general matter, courts have interpreted special venue provisions to supplement, rather than preempt, general venue statutes." . . .
>
> The desire to view Section 12's venue provision as expansive does not justify the Ninth Circuit's total disregard of the first clause, particularly given the literal convolutions required to jettison the first clause. *Indeed, it seems quite unreasonable to presume that Congress would intentionally craft a two-pronged provision with a superfluous first clause, ostensibly link the two provisions with the "in such cases" language, but nonetheless fail to indicate clearly anywhere that it intended the first clause to be disposable.*

199 F.3d at 1350-51 (emphasis added); *see also id.* at 1351 ("A party seeking to take advantage of Section 12's liberalized service provisions must follow the dictates of both of its clauses. To read the statute otherwise would be to ignore its plain meaning.").

The District of Columbia Circuit also drew support for its well-reasoned interpretation of Section 12 from "the position taken by the Second Circuit." *Id.* at 1351 (citing *Goldlawr, Inc. v. Heiman*, 288 F.2d 579, 581 (2d Cir. 1961), *rev'd on other grounds*, 369 U.S. 463 (1962)). In *Goldlawr*, the Second Circuit explained the operation of Section 12 as follows:

> Section 12 of the Clayton Act . . . specifies where suit against a corporation under the antitrust laws may be brought, namely, in a district where it is an inhabitant and also where 'it may be found or transacts business.' Conversely, it should follow that if a corporation is not an inhabitant of, is not found in,

> and does not transact business in, the district, suit may not be so brought. By statutory grant if suit is brought as prescribed in this section 'all process in such cases may be served in the district of which it (the corporation) is an inhabitant, or wherever it may be found.' Thus, 'in such cases,' Congress has seen fit to enlarge the limits of the otherwise restricted territorial areas of process. *In other words, the extraterritorial service privilege is given only when the other requirements are satisfied.*

288 F.2d at 581 (emphasis added) (footnote and citations omitted).

This Court's decision in *Goldlawr* left the Second Circuit's interpretation of Section 12 intact. This Court reversed based on its rejection of the Second Circuit's entirely separate holding that the venue-transfer statute, 28 U.S.C. § 1406(a),[7] requires "the transferring court [to have] personal jurisdiction over the defendants." 369 U.S. at 465; *see also id.* at 466 ("The language of § 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants or not.").

The attempt by the *Go-Video* Court and other courts to brush aside the Second Circuit's interpretation of Section 12 in *Goldlawr* as "dictum," *e.g.*, *Go-Video*, 885 F.2d at 1411, is wholly unpersuasive. *Goldlawr* reached the issue upon which this Court reversed – whether the transferor court under § 1406(a) must have personal jurisdiction over the defendant – only because it had first held that plaintiff's failure to satisfy the special venue provision contained in Section 12's first clause prevented plaintiff from obtaining personal juris-

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[7] 28 U.S.C. § 1406(a) provides, as it did then: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

diction under Section 12's second clause. *See* 288 F.2d at 581. That latter holding – which directly conflicts with the holdings of the Third, Ninth and Eleventh Circuits – was necessary to the Second Circuit's decision in *Goldlawr* and remains intact to this day, as the District of Columbia Circuit has recognized. *See supra*, at 12-13.

In sum, the Second and District of Columbia Circuits have squarely held that antitrust plaintiffs may not use Section 12's special extraterritorial-service-of-process provision in lieu of the general state long-arm statute without also satisfying Section 12's special venue provision, which is part of the same sentence from which the service-of-process provision is taken, and to which it specifically refers.

3. The circuit split on the proper interpretation of Section 12 may actually be deeper than 3-2, given the closely related, albeit arguably distinguishable, holdings of the Fourth and Tenth Circuits in *Ballard v. Blue Shield of Southern West Virginia, Inc.*, 543 F.2d 1075 (4th Cir. 1976), and *Board of County Commissioners of the County of Chester v. Wilshire Oil Co. of Texas*, 523 F.2d 125 (10th Cir. 1975). In *Ballard*, the Fourth Circuit stated that "[a]lthough venue in antitrust actions is generally governed by 15 U.S.C. §§ 15, 22 – which allow suit in the district where the defendant resides, is found, has an agent, or transacts business – these statutes are not exclusive." 543 F.2d at 1080 (citing *Adams Dairy Co. v. National Dairy Products Corp.*, 293 F. Supp. 1135, 1140-41 (W.D. Mo. 1968)). The court then held that plaintiffs could resort to a general venue statute outside of the Clayton Act, namely 28 U.S.C. § 1392(a), which at the time provided that "'any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts.'" 543 F.2d at 1080.

Similarly, in *Board of County Commissioners*, the Tenth Circuit held that "the general venue statute, § 1392(a), which allows an action against defendants residing in different districts in the same state to be brought in one of such districts even though one of the defendants did not reside there,"

"supplements 15 U.S.C. § 22 [Section 12 of the Clayton Act]." 523 F.3d at 127, 131.

However, the Fourth and Tenth Circuits' decisions in *Ballard* and *Board of County Commissioners* are arguably distinguishable and not as egregious as the aforementioned decisions of the Third, Ninth, and Eleventh Circuits. That is because they authorized an antitrust suit to go forward in one particular federal judicial district located in a State with multiple districts, provided all the defendants resided in that State. Thus, the breadth of permissible forum-shopping accorded antitrust plaintiffs is much more sharply circumscribed under these decisions, thereby limiting the hardship and unfairness, and the international comity implications, of haling out-of-district defendants into a federal district court in a State in which they reside.[8]

4. This split of authority has not gone unnoticed by other Circuits, and has produced academic commentary on both sides of the split. In *Sanderson v. Spectrum Labs, Inc.*, for example, the Seventh Circuit explicitly "recognize[d] that the circuits court are currently split with respect to the proper scope of the Clayton Act's nationwide service of process provision," and then drew a comparison between *GTE New*

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[8] The First Circuit has not squarely confronted the issue. In *Aro Manufacturing v. Automobile Body Research Corp.*, 352 F.2d 400 (1st Cir. 1965), that court first explained that "service of process is the vehicle by which the court may obtain [personal] jurisdiction," and then stated:

> The venue provision of the Clayton Act [Section 12], under which this suit is brought, also provides where process in such suit may be served. In suits under this statute, service on a foreign corporation is also valid if made in the manner prescribed by the law of the state in which service is made. Fed. R. Civ. P. 4(d)(7).

352 F.2d at 402-03 (footnote omitted). Because the court went on to hold that process had not been validly served under *any* available method, it had no occasion to reach the issue of which venue statute was available. 352 F.2d at 404.

Media Servs. and *Go-Video*. *Sanderson*, 2000 U.S. App. LEXIS 34058, at *8-*9 (7th Cir. Dec. 29, 2000) (unpub. order).

And in *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir. 1981) the Sixth Circuit noted the issue, but then stated that "[w]e need not decide this question because" the defendant "waive[d] any such objection here." 643 F.2d at 1238 n.3. *See also, e.g.*, *In re Magnetic Audiotape Antitrust Litigation*, 334 F.3d 204, 207 (2d Cir. 2003) (noting split); Jordan G. Lee, *Section 12 of the Clayton Act: When Can Worldwide Service of Process Allow Suit In Any District?* 56 FLA. L. REV. 673, 681-82 (2004) ("The treatment of the venue and worldwide service of process provisions of section 12 varies among the circuits, with some holding that section 12 broadly supplements the general venue and service of process requirements, but others holding that it narrowly supplants the general statutes"); *id.* at 688 ("It appears that federal circuits are evenly divided on the issue of which side of the section 12 debate to follow, creating confusion for potential litigants"); Von Kalinowski, 10 *Antitrust Laws and Trade Regulation*, § 1.06[4][a] at 1-104 (2d ed. 1999) ("A key question in international antitrust actions is whether personal jurisdiction may constitutionally be asserted over an alien person or entity."); *id.* at § 1.06[1] at 1-56 n.4.2 (citing, *inter alia*, *GTE New Media Servs*).

In his well-reasoned analysis predating *Go-Video* by several years, Professor Hovenkamp explained why "[i]t might be unfair to create a rule that would permit an alien whose only contacts with the United States are in New York to be haled before a federal court in California." Herbert Hovenkamp, *Personal Jurisdiction and Venue in Private Antitrust Actions in the Federal Courts: A Policy Analysis*, 67 IOWA L. REV. 485, 503 (1981-82) (footnote and citations omitted); *id.* at 504 ("Simply because a defendant is doing business *somewhere* in the United States, it should nevertheless not be answerable to suit *everywhere*.") (emphases in original).

Professor Hovenkamp explained more fully:

> The combination of the general venue statute and the aggregate [national] contacts doctrine could subject some defendants, particularly aliens, to unfair treatment. Under Clayton Act section 12 a plaintiff could obtain service on the defendant wherever it may be found and the aggregate contacts doctrine would enable the court to obtain personal jurisdiction over the defendant provided it had the requisite minimum contacts anyplace in the nation. For example, a European corporation doing business only in New York could be sued in California, and both venue and personal jurisdiction could be obtained.
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> A better approach is to interpret section 12 the way it is written. Worldwide service is proper only when the action is brought in the district where the defendant resides, is found, or transacts business. Thus, *the plaintiff who steps outside of section 12 to establish venue must also lose the benefit of section 12 for obtaining service of process. The plaintiff must then rely on the long-arm statute of the forum state.*

Id. at 509 (emphasis added) (footnotes and citations omitted).[9] Finally, Professor Hovenkamp noted that this Court in *Leroy v. Great Western United Corp.* "expressly rejected any

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[9] Professor Hovenkamp also observed:

> Other federal statutes that provide for worldwide service are limited by venue provisions that protect the defendant regarding choice of forum. For example, the Foreign Sovereign Immunities Act . . . also has its own special venue provisions. These provisions restrict venue to the judicial district in which "a substantial part of the events or omissions giving rise to the claim occurred," or where the defendant is licensed to do business or is doing business, or, in the case of foreign states themselves, in the District of Columbia. 28 U.S.C. § 1391(f) (1976).

Hovenkamp, *Personal Jurisdiction and Venue in Private Antitrust Actions in the Federal Courts*, at 509 n.121.

interpretation intimating that under certain actions, in which the injuries might flow everywhere, the defendants could be answerable in every [judicial] district in the United States." Hovenkamp, at 516 (citing 443 U.S. 173, 184-85 (1979)).

5. The conflict of authority amongst the Circuits has also bred confusion and divergent outcomes amongst the district courts, leaving present and future litigants to guess at which of the competing interpretations of Section 12 will govern in their case, sometimes even in those Circuits comprising the aforementioned split.

In *General Electric Co. v. Bucyrus-Erie Co.*, for example, the Southern District of New York misconstrued *Goldlawr* "as requiring that *some* applicable venue statute must be met before section 12's service and personal jurisdiction clause may be invoked." 550 F. Supp. 1037, 1042 (S.D.N.Y. 1982) (emphasis in original); *but see supra*, at 14-15. Having brushed aside binding Circuit precedent, the court then offered the following dubious grammatical rationale that even the Ninth Circuit in *Go-Video* shied away from endorsing, *see Go-Video*, 885 F.2d at 1412:

> The word "such" means "the aforementioned," *Webster's Third International Dictionary* (unabr. ed. 1963). Thus, when "such" precedes a noun it is assumed to refer to a particular antecedent noun and any dependent adjective or adjectival clauses modifying that noun, but not to any other part of the preceding clause or sentence. Applying this rule to section 12, "in such cases" would refer to "any suit, action, or proceeding under the antitrust laws against a corporation," and not to anything else in section 12's first clause.

550 F. Supp. at 1042 n.7.[10]

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[10] The court offered no support – nor does there appear to be any – for its critical premise that "when 'such' precedes a noun it is assumed to refer to a particular antecedent noun and any dependent

Other district courts have similarly misconstrued Section 12, although most have not done so based upon the foregoing grammatical rationale. *See, e.g.*, *United Phosphorus, Ltd. v. Angus Chem. Co.*, 43 F. Supp. 2d 904, 911 (N.D. Ill. 1999); *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.*, 982 F. Supp. 1138, 1145 n.12 (E.D. Va. 1997); *Paper Sys. Inc. v. Mitsubishi Corp.*, 967 F. Supp. 364, 366-67 (E.D. Wisc. 1997); *Daniel v. American Bd. of Emergency Medicine*, 988 F. Supp. 127, 144 (W.D.N.Y. 1996) (but recognizing that its interpretation of Section 12 would render the first clause thereof superfluous); *Icon Indus. Controls Corp. v. Cimetrix, Inc.*, 921 F. Supp. 375, 376 (W.D. La. 1996) ("this action literally may be brought in *any* judicial district") (emphasis added); *Miller Pipeline Corp. v. British Gas*, 901 F. Supp. 1416, 1420 (S.D. Ind. 1995); *Kingsepp v. Wesleyan Univ.*, 763 F. Supp. 22, 24 (S.D.N.Y. 1991); *In re Plastic Bag Production Patent and Antitrust Litigation*, 1987 U.S. Dist. LEXIS 3881, at *5-*6 (D. Mass. Apr. 24, 1987); *Amtrol, Inc. v. Vent-Rite Valve Corp.*, 1986 U.S. Dist. LEXIS 25340, at *20 (D. Mass. May 19, 1986); *King v. Johnson*

[Footnote continued from previous page]

adjective or adjectival clauses modifying that noun, but not to any other part of the preceding clause or sentence."

This fallacy appears to rest on the unstated assumption that the word "such" as used in Section 12's second clause either functions as a pronoun, or should be treated as having the same attributes that the word "such" may have when it functions as a pronoun. However, the word "such" as used in Section 12's second clause functions as an adjective modifying the noun "cases" ("in *such* cases"), and there is nothing that prevents the phrase "in such cases" from referring to the category of cases described in the first clause of the sentence at issue.

Indeed, as the District of Columbia Circuit has explained, "in such cases," most naturally read in the context of the sentence of which it is a part, clearly refers to all antitrust suits against a corporation in a judicial district inhabited by the corporation, or in which the corporation may be found or transacts business. *GTE New Media Servs.*, 199 F.3d at 1351.

Wax Associates, Inc., 565 F. Supp. 711, 719 n.11 (D. Md. 1983); *Scriptomatic, Inc. v. Agfa-Gevaert, Inc.*, 1973 WL 830, at *2 (S.D.N.Y. Jun. 28, 1973); *Hoffman Motors Corp. v. Alfa Romeo S.p.A.*, 244 F. Supp. 70, 84 (S.D.N.Y. 1965).

A countervailing body of precedent has developed, however, in other district courts that have hewed more closely to their own binding Circuit authority and to a construction of Section 12 that does not render the first clause thereof superfluous. In *Management Insights, Inc. v. CIC Enterprises, Inc.*, for example, the Northern District of Texas reasoned as follows, after "recogniz[ing] that a circuit split exists":

> [T]he Ninth Circuit's reading of section 12, which allows a national contacts personal jurisdiction analysis if venue is proper under section 12 or § 1391, coupled with § 1391(c)'s provision that venue is proper for corporate defendants as long as personal jurisdiction exists in a particular district, requires a court's inquiry into venue and jurisdiction in antitrust cases to become indisputably circular and monolithic. Section 1391(c) coalesces with the service of process portion of section 12 to ask the unified question: Has the corporate defendant had the requisite minimum contacts with the United States? If the defendant is a domestic corporation, the Ninth Circuit's approach, in conjunction with § 1391(c), allows a plaintiff to sue a defendant *in any district*, even if that district has absolutely no relation to the defendant's business or to the incident that prompted the suit. For instance, a Texas plaintiff could hale an Alaskan corporate defendant into its courts even though the defendant has had no dealings at all with the forum state. The *Go-Video* Court pointed to no legislative history that supports such a broad reading of section 12, and this Court finds that such an interpretation is indeed contrary to the plain meaning of the statute.

194 F. Supp. 2d 520, 532 (N.D. Tex. 2001) (footnote and citations omitted).

Several other district courts have joined in this more textually sound interpretation of Section 12, which has the advantage of not rendering the first half of Section 12 wholly superfluous. *See, e.g., Yellow Page Solutions, Inc. v. Bell Atlantic Yellow Pages Co.*, 2001 WL 1468168, at *3 (S.D.N.Y. Nov. 19, 2001) (following *Goldlawr* and *GTE New Media Servs.*); *Sea-Roy Corp. v. Parts R Parts, Inc.*, 1996 U.S. Dist. LEXIS 13565, at *18 (M.D.N.C. Jul. 30, 1996); *Michelson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 709 F. Supp. 1279, 1286-87 (S.D.N.Y. 1989) (following *Goldlawr*); *Reynolds Metal Co. v. Columbia Gas Sys., Inc.*, 694 F. Supp. 1248, 1250 (E.D. Va. 1988); *Grosser v. Commodity Exch., Inc.*, 639 F. Supp. 1293, 1315 (S.D.N.Y. 1986) ("because venue as to MACE does not lie in this district, personal jurisdiction cannot be asserted over it by means of the nationwide service of process provision of Section 12").

The current divide of authority amongst the district courts, tracking the earlier-described circuit split, will only deepen absent authoritative guidance by this Court.

B. The Circuit Split Regarding The Correct Interpretation Of Section 12 Of The Clayton Act Raises Significant Constitutional and International Comity Concerns

Allowing the tortured interpretation of Section 12 by the Third, Ninth, and Eleventh Circuits to remain uncorrected will not only breed further confusion amongst litigants, but will give rise to significant constitutional and international comity concerns that can be avoided by construing the statute as it is written.

1. Conditioning the use of Section 12's worldwide-service-of-process provision on satisfying Section 12's venue provision avoids a difficult constitutional issue that this Court has declined to reach at least twice in recent years. In *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, a plurality of this Court noted:

> We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits. See *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 293-295 (CA3 1985); *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 283 (CA3 1981); see also Born, Reflections on Judicial Jurisdiction in International Cases, to be published in 17 Ga. J. Int'l & Comp. L. 1 (1987); Lilly, Jurisdiction Over Domestic and Alien Defendants, 69 Va. L. Rev. 85, 127-145 (1983).

480 U.S. 102, 113 n.* (1987) (plurality op.); *see also Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 102-03, n.5 (1987) (citations omitted); *In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d at 299 n.15 ("We note, as did the *Go-Video* court, that the Supreme Court has on two occasions explicitly declined to decide the constitutionality of national contacts analysis.") The uncertainty regarding whether Section 12 allows a foreign corporation to be sued in any judicial district of the United States, based only on the corporation's aggregate contacts with the United States as a whole, presents another, related basis for granting review by this Court. Not only is there a conflict of authority in the lower courts about the constitutionality of aggregate "national contacts" analysis, but the position taken by several of those courts upholding such analysis appears to be in tension with this Court's precedents.

As Judge Garza has explained:

> Because the personal jurisdiction requirement is a function of the individual liberty interest, the proper focus for a personal jurisdiction test should be on protecting an individual's liberty interest in avoiding the burdens of litigating in a distant or inconvenient

> forum. Requiring that the individual defendant in a national service of process case only reside somewhere in the United States does not protect this interest. Consequently, I believe that the majority errs when it concludes that the proper personal jurisdiction test in a national service of process case is whether minimum contacts exist between the individual defendant and the national sovereign.

Busch v. Buchman, Buchman & O'Brien, 11 F.3d 1255, 1259 (5th Cir. 1994) (Garza, J., dissenting); *see also Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 947 n.23 (11th Cir. 1997) ("At this point, we depart from the reasoning and holdings of the majority of our sister circuits [upholding aggregate 'national contacts' analysis]."); *id.* at 945 n.18 ("'The better view . . . would require that the national contacts test be supplemented by some assurances that the particular choice of forum will be one that is fair to the defendant.'") (quoting Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 1067.1, at 325 (1987)); *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1389 n.2 (8th Cir. 1991) ("The fifth amendment is 'essentially a recognition of the principles of justice and fundamental fairness,' . . . so it is appropriate that we examine the contacts *with the forum state*.") (emphasis added) (citations omitted).

Such an interpretation seems most consistent with the theoretical basis articulated by this Court for imposing due process limits on the exercise of personal jurisdiction over non-resident defendants. As this Court explained in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*:

> The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of indi-

> vidual liberty. Thus, the test for personal jurisdiction requires that "the maintenance of the suit . . . not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), *quoting Milliken v. Meyer*, 311 U.S. 458, 463 (1940).
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> . . .
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> [T]he Due Process Clause . . . is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

456 U.S. 694, 702-03 & n.10 (1982) (footnote omitted); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 & n.13 (1985); *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd.*, 647 F.2d 200, 203 n.4 (D.C. Cir. 1981) (R.B. Ginsburg, J.) ("As to federal court jurisdiction, particularly in litigation involving federal claims, . . . the fairness-to-defendant consideration[] remains vital").

Courts that have approved of aggregate "national contacts" analysis have more often than not simply assumed away a critical part of the constitutional question: namely, whether the relevant forum against which to test a defendant's contacts is the United States as a whole, or the particular judicial district in which the district court sits (*e.g.*, the District of Maine). And they have done so on a basis that is not true to this Court's teaching in *Bauxites* and *Burger King*: namely, that the individual, rather than the sovereign, is the relevant focus for analyzing due process limits on personal jurisdiction. *See, e.g.*, *Federal Trade Comm'n v. Jim Walter Corp.*, 651 F.2d 251, 256 (5th Cir. Unit A 1981) ("Because the district court's jurisdiction is always potentially . . . co-

extensive with the boundaries of the United States, due process requires only that a defendant in a federal suit have minimum contacts with the United States, 'the sovereign that has created the court'") (citations omitted); *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974).

2. The approach that allows a foreign corporation to be sued in any judicial district of the United States, regardless of whether that corporation has any contacts with that district or with the State in which that district court sits, also raises significant international comity concerns. This approach threatens to subject many more foreign corporations to suit in American courts under United States antitrust law and, pursuant to the doctrine of "pendent personal jurisdiction," under any state laws giving rise to factually related claims. *E.g., Action Embroidery*, 368 F.3d 1174, 1180.[11] Yet this Court observed just last Term in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, that "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." No. 03-724, slip op. at 7 (U.S. Jun. 14, 2004).

Moreover, the approach adopted by the Third, Ninth, and Eleventh Circuits, and the District Court here, gives plaintiffs free rein to subject foreign corporations to suit *anywhere* in the United States, no matter how unfair or inconvenient that location is to the foreign defendant, or how

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[11] This risk is illustrated in the instant case. At least four States have dismissed Daimler Canada or Mercedes Canada from state cases paralleling the instant case: *Maxwell v. General Motors Corp., et al.*, No. CV 2003-003925 (Sup. Ct. Maricopa Co. Ariz., May 6, 2004), *Lerfeld v. General Motors Corp., et al.*, No. CT03-003327 (Hennepin Co. Dist. Ct. Minn., Nov. 14, 2003), *Paltre v. General Motors Corp.*, Index No. 005014/2003 (Sup. Ct. Nassau Co. New York, Apr. 21, 2004), and *Wilson v. General Motors Corp., et al.*, No. L-1287-03 (Super. Ct. Camden Co. New Jersey, Oct. 3, 2003). Yet Judge Hornby has asserted supplemental jurisdiction over identical claims based on the law of these States that were also filed in the federal proceeding, and has indicated that he will not be bound by the determinations of lack of jurisdiction by those state courts.

unrelated that district is to whatever contacts the foreign defendant may have with some other part of the United States.

Such an outcome does not differ all that much from the outcome that this Court categorically rejected last Term in *Empagran*: a situation in which, "'[e]ffectively, the United States courts would provide *worldwide subject matter jurisdiction*" to antitrust plaintiffs wishing to sue foreign corporations having some tangential relation to the United States as a whole. Slip op. at 10 (emphasis added) (quoting P. Areeda & H. Hovenkamp, Antitrust Law ¶ 273, pp. 51-52 (Supp. 2003)); *see also id.* at 11 (citing the concerns expressed in the amicus briefs filed by Canada, Japan, and the Federal Republic of Germany).

Several Terms ago, this Court emphasized that "'[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field,'" and that courts should be mindful of "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system." *Asahi*, 480 U.S. at 114-15 (citations omitted).

II. THERE IS NO REASON TO DEFER REVIEW OF THE PURE QUESTION OF LAW PRESENTED IN THIS PETITION UNTIL THE ENTRY OF FINAL JUDGMENT IN THIS CASE

This Court should not wait until the entry of final judgment in this case to resolve the pure question of law presented in this Petition, on which the Circuits are split, and which the District Court certified for interlocutory appeal. The First Circuit's refusal to rule upon the scope and interrelationship of Section 12's personal jurisdiction and venue provisions departs from the established practice of nearly every other Circuit that has addressed this issue. Every other Circuit has done so either on interlocutory appeal, or on direct appeal following the district court's dismissal of the lawsuit for lack of personal jurisdiction. *See In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288, 290 (3d Cir. 2004) (interlocutory appeal); *GTE New Media Servs.*

Inc. v. Bellsouth Corp., 199 F.3d 1343, 1345 (D.C. Cir. 2000) (same); *Go-Video, Inc. v. Akai Electric Co., Ltd.*, 885 F.2d 1406, 1407 (9th Cir. 1989) (same); *Goldlawr, Inc. v. Heiman*, 288 F.2d 579, 580 (2d Cir. 1961) (same), *rev'd on other grounds*, 369 U.S. 463 (1962); *see also Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1176 (9th Cir. 2004) (on appeal of district court's dismissal of lawsuit); *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 845 (11th Cir. 1988) (same); *Aro Manufacturing Co., Inc. v. Automobile Body Research Corp.*, 352 F.2d 400, 402 (1st Cir. 1965) (same).

This is hardly surprising, given that the whole point of the defense of lack of personal jurisdiction is to protect nonresidents from the burden of having to defend suit in the foreign forum. As one Court of Appeals has explained:

> As a general rule, courts should address issues relating to personal jurisdiction before reaching the merits of a plaintiff's claims. *See Madara v. Hall*, 916 F.2d 1510, 1513-14 & n.1 (11th Cir. 1990); Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, Civil 2d § 1351, at 243-44 (1990). A defendant that is not subject to the jurisdiction of the court cannot be bound by its rulings. *Madara*, 916 F.2d at 1514. Thus, as a preliminary matter, courts should determine if they have the power to bind a defendant with a ruling on the merits of the case.

Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 940 (11th Cir. 1997); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980) ("The concept of minimum contacts . . . protects the defendant against the burdens of litigating in a distant or inconvenient forum."). That is also presumably why a defense of lack of personal jurisdiction is waived unless raised in a motion to dismiss or a responsive pleading at the outset of a lawsuit. *See* Fed. R. Civ. P. 12(h)(1).

It would be wholly incongruous to require Petitioners to endure a costly trial and related proceedings in this multi-

million-dollar lawsuit, and to overcome the pressure to settle such a high-stakes lawsuit in the interim, before their defense of lack of personal jurisdiction can be vindicated. Such a requirement would inflict upon Petitioners the very damage and injury against which the defense of lack of personal jurisdiction was designed to protect.

Finally, even if Petitioners again raised this issue of law for review on direct appeal following the entry of final judgment in this case, it is far from clear that there would be any further factual or legal development of the statutory interpretation issues presented in this petition. As the District Court noted in its certification order, resolving this pure question of law now will "materially advance" "the ultimate termination of th[is] complex multidistrict litigation" "as to these two Canadian parties [Petitioners], because if they are successful on their appeal of this issue, the litigation will terminate as to them." Pet. App. 27a.

CONCLUSION

A deep and clear circuit split exists on a question of statutory interpretation that, if left unresolved, threatens to raise serious constitutional, commercial, and international comity concerns. This Court should therefore grant the instant petition for a writ of certiorari.

Respectfully submitted.

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November 30, 2004

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 04-8006

IN RE: NEW MOTOR VEHICLES
CANADIAN EXPORT ANTITRUST LITIGATION

GEORGE JAYNES, ET AL.,
Plaintiffs, Respondents,

v.

DAIMLERCHRYSLER CANADA INC., ET AL.,
Defendants, Petitioners.

Before
Torruella, Selya and Howard, Circuit Judges.

JUDGMENT
Entered: August 3, 2004

We decline, in the exercise of our discretion, to accept this issue for interlocutory appeal under 28 U.S.C. § 1292(b).

By the Court:

Richard Cushing Donovan, Clerk.

By: /s/ Julie Gregg
Appeals Attorney

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

IN RE NEW MOTOR VEHICLES CANADIAN EXPORT ANTITRUST LITIGATION	]]]]	MDL Docket No. 1532

MEMORANDUM DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

In this opinion I conclude that section 12 of the Clayton Act permits worldwide service of process upon alien corporate defendants in antitrust cases, and that the Fifth Amendment measures the constitutional adequacy of contacts by such defendants according to their contacts with the United States as a whole.

I. SUMMARY

New motor vehicle purchasers and lessees claim that American and Canadian car manufacturers, distributors, dealers (although not named as defendants) and dealer associations conspired to prevent a discount distribution channel from operating in the United States-specifically, that cheaper Canadian versions of various models were prohibited entry into the American market. They maintain that the conspiracy violated section 1 of the Sherman Act, 15 U.S.C. § 1 (1997),

and that the resulting lack of competition kept American retail prices excessively high. They seek class-wide damages[1] and injunctive relief under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 (1997). The Multi-District Panel has transferred 26 such cases to this District for pretrial management. Parallel cases are pending in a number of state courts.

Certain Canadian defendants-Toyota Canada, Inc. ("Toyota Canada"); DaimlerChrysler Canada, Inc. ("Daimler Canada"); Mercedes-Benz Canada, Inc. ("Mercedes-Benz Canada"); Nissan Canada, Inc. ("Nissan Canada"); BMW Canada, Inc. ("BMW Canada"); and the Canadian Automobile Dealers Association ("CADA") - move to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2).

After oral argument on January 5, 2004, it is my understanding that (1) the plaintiffs' Amended Consolidated Class Action Complaint supercedes *all* previous complaints in these consolidated actions; (2) no defendants now seek dismissal for improper service of process; (3) the plaintiffs do not assert jurisdiction based on any state long-arm statute; and (4) the plaintiffs do not attempt to meet the First Circuit's requirement for asserting personal jurisdiction under Fed. R. Civ. P. 4(k)(2). *See United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 41-42 (1st Cir. 1999) .

I **DENY** the 12(b)(2) motions of Daimler Canada and CADA. I **GRANT** the 12(b)(2) motions of Nissan Canada, BMW Canada and Toyota Canada. I **DEFER** action on the motion of Mercedes-Benz Canada, while permitting jurisdictional discovery concerning Mercedes-Benz non-export arrangements.

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[1] The request for class certification is not yet ripe.

II. ANALYSIS

(A) Section 12 of the Clayton Act

Section 12 of the Clayton Act provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22 (1997).

The cases are unanimous that this single sentence has two topics. The clause before the semi-colon is a venue provision (describing districts where an antitrust lawsuit against a corporate defendant may be heard). *See United States v. Scophony Corp.*, 333 U.S. 795, 802 (1948); *GTE New Medical Servs. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000); *In re Auto. Refinishing Paint Antitrust Litig.*, 2004 U.S. App. LEXIS 2432, *11 (3d Cir.). The clause following the semi-colon is a jurisdiction/service of process provision (describing where a corporate defendant may be served with papers that bring it before a particular court). *See id.* The cases also agree that the second clause's final phrase, "wherever it may be found," permits worldwide service of process upon a corporate defendant if that corporate defendant is subject to section 12's language. *See Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1413 (9th Cir. 1989); *Auto. Refinishing Paint*, 2004 U.S. App. LEXIS 2432, at * 11; *Amtrol, Inc. v. Vent-Rite Valve Corp.*, 646 F. Supp. 1168, 1171 (D. Mass. 1986).

But courts have struggled for years with the meaning of the second clause's limiting phrase "in such cases."[2] Does "such cases" mean antitrust lawsuits against a corporate defendant? Or does it mean only antitrust cases against a corporate defendant that meet all the criteria of the first clause, *i.e.*, where venue is established on the criteria set out there? The question is important because there is a separate venue statute that is broader for alien defendants, permitting venue over alien defendants in any district. *See* 28 U.S.C. § 1391(d). If plaintiffs can use the alien venue statute in combination with section 12's service of process provision, they can sue an alien corporate defendant in federal court anywhere in the United States, subject to constitutional limitations, and serve that defendant anywhere in the world. But if section 12's worldwide service provisions are limited to cases where venue exists under section 12's first clause, plaintiffs will be far more limited in their choice of forum.

The parties agree that in this multi-district case I must apply First Circuit law to determine the answer. Unfortunately, the First Circuit has not spoken on the issue. Until last month, there was an even split of the other Circuits, the Ninth Circuit choosing the first (broader) interpretation and the D.C. Circuit choosing the second (narrower).[3] *Compare*

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[2] *See, e.g., Auto. Refinishing Paint*, 2004 U.S. App. LEXIS 2432, at *12; *GTE*, 199 F.3d at 1351; *Go-Video*, 885 F.2d at 1408; *Goldlawr, Inc. v. Heiman*, 288 F.2d 579, 581 (2d Cir. 1961); *General Elec. Co. v. Bucyrus-Erie Co.*, 550 F. Supp. 1037, 1041-42 (S.D.N.Y. 1982).

[3] It is unclear how the Second Circuit currently views section 12 of the Clayton Act. *Compare Goldlawr*, 288 F.2d at 581 ("[I]f a corporation is not an inhabitant of, is not found in, and does not transact business in, the district, suit may not be so brought. . . .

[Footnote continued on next page]

Go-Video, 885 F.2d at 1413 *with GTE*, 199 F.3d at 1351. Part of the delay in issuing this opinion reflected my own effort to write an opinion dealing with the ambiguous language of the statute, the circuit and district cases, the legislative history, and Supreme Court pronouncements about venue generally and about the section 12 language in particular. But now the Third Circuit has written a comprehensive opinion surveying the authorities, *In re Auto. Refinishing Paint Antitrust Litig.*, 2004 U.S. App. LEXIS 2432. I see no reason as a trial court judge to repeat what it has done. Its reasoning is persuasive. I believe the First Circuit will follow it, if presented with the issue. I therefore follow the Third Circuit (and the Ninth Circuit), concluding that the second, worldwide service, clause of section 12 is available in antitrust cases generally against corporate defendants, and that a plaintiff can use it in conjunction with the alien venue statute.

(B) Nationwide Contacts

Finding that the statutes permit personal jurisdiction is the first step in the analysis. But there is a second step: the exercise of jurisdiction must also meet constitutional requirements. Because the personal jurisdiction asserted here derives from federal statutes, I do not apply the traditional Fourteenth Amendment due process analysis that deals with the power of the individual states. Instead, the constitutional

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[Footnote continued from previous page]

[T]he extraterritorial service privilege is given only when the other requirements are satisfied."), *with Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1341 & n.10 (2d Cir. 1972) (liberally construing the same phrase in the Securities Exchange Act as referring only to service of process and having nothing to do with venue, and noting that the "ineptly worded provision" was modeled after section 12 of the Clayton Act).

inquiry arises under the Fifth Amendment (dealing with the federal government) and the analysis is whether a particular defendant has sufficient contacts with the United States as a whole to justify the assertion of federal court jurisdiction over it. The Supreme Court has not spoken to this issue, but that is the teaching of First Circuit caselaw. In *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 618 (1st Cir. 2001), the court stated:

> The personal jurisdiction inquiry in federal question cases like this one differs from the inquiry in diversity cases. Here, "the constitutional limits of the court's personal jurisdiction are fixed ... not by the fourteenth Amendment but by the Due Process Clause of the Fifth Amendment." This distinction matters because under the Fifth Amendment, a plaintiff need only show that the defendant has adequate contacts with the United States as a whole, rather than with a particular state.

(internal citations omitted); *accord United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1085 (1st Cir. 1992). Here, the plaintiffs assert both general and specific jurisdiction. I analyze the showing they have made under the *prima facie* standard of *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671,675 (1st Cir. 1992). Thus I "consider only whether the plaintiff has proffered evidence that, if credited, is enough to support findings of all facts essential to personal jurisdiction." *Id.* I consider both "general" jurisdiction (jurisdiction asserted in connection with suits not directly founded on forum-based conduct) and "specific" jurisdiction (jurisdiction asserted when a suit arises directly out of forum-based activities). *See Donatelli v. National Hockey League*, 893 F.2d 459, 462-63 (1st Cir. 1990) (citations omitted). Because there is no Supreme Court caselaw on the Fifth Amendment issue, I use the factors identi-

fied in its Fourteenth Amendment jurisdictional cases, as they apply to nationwide contacts.

(1) General Jurisdiction

Assertion of general jurisdiction over a defendant requires a court to examine a defendant's contacts with the forum "to determine whether they constitute the kind of continuous and systematic general business contacts" that will satisfy constitutional standards. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). If sufficient contacts do exist, the exercise of jurisdiction must also be reasonable. *Swiss Am. Bank*, 274 F.3d at 619 (citing *Donatelli*, 893 F.2d at 465). But if such contacts do not exist in sufficient abundance, the general jurisdiction inquiry ends. *Donatelli*, 893 F.2d at 465. The constitutional parameters of general jurisdiction require the contacts to be "continuous" and "substantial" (single or isolated activities are insufficient), and at a level "that a party who enjoys the benefits of conducting business in a particular forum should be willing to bear the correlative burden of submitting to the forum's courts." *Id.* at 463 (citing *Int'l Shoe Co. v. State of Washington*, 326 U.S. 310, 317-19 (1945)). The Supreme Court has said that these principles are designed to permit people or entities to structure their conduct in such a manner as to gain some assurance that their conduct will not render them liable to suit in a particular jurisdiction. *See Burger King v. Rudzewicz*, 471 U.S. 461, 472 (1985) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

In this case, the plaintiffs allege general factors in support of general jurisdiction: the defendants benefited from international agreements designed for the automotive industry such as NAFTA and Auto Pact; substantial automotive trade goes on between the United States and Canada; and complex corporate structures camouflage the reality of United States trade. Pls.' Mem. in Opp'n at 3-7 (Docket Item #74). These contextual allegations are insufficient to

support general personal jurisdiction. A particular defendant *itself* must create the connection with the forum. *See Asahi Metal Indus. Co., Ltd. v. Super Ct. of California, Solano County*, 480 U.S. 102, 109 (1987) (citing *Burger King*, 471 U.S. at 475).

The plaintiffs also point to various defendant activities as continuous and systematic contacts with the United States sufficient to support general jurisdiction: using United States-based advertising services; officers attending meetings and training in the United States; purchasing parts and vehicles from the United States; manufacturing and selling vehicles in Canada that ultimately end up in the United States market; and being party to American lawsuits. PIs.' Mem. in Opp'n at 7-13. I conclude that separately and collectively these factors and activities do not meet the constitutional threshold for general jurisdiction over the Canadian defendants.

First, taking advantage of American advertising services, attending general meetings in the United States or purchasing vehicle parts from the United States unrelated to the underlying cause of action, without more, will not support general jurisdiction. *See, e.g., Helicopteros*, 466 U.S. at 416, 418 (purchases of helicopters, equipment and training services, even if occurring at regular intervals, accepting into a bank account checks drawn on a bank located in the forum and sending personnel and officers to the forum for training and contract negotiation sessions are not sufficient to warrant personal jurisdiction over a nonresident defendant corporation in a cause of action not related to those activities); *Swiss Am. Bank*, 274 F.3d at 619-20 (citing *United States v. Swiss Am. Bank, Ltd.*, 116 F. Supp.2d 217, 221-22 (D. Mass. 2000)) (foreign bank's advertising in an American magazine, subscribing to an American credit card company, entering into a licensing agreement with an American company, being an appellant to a lawsuit in an American court, having relationships and accounts with American banks and entering

into contracts, joint ventures and loan agreements with American companies are insufficient contacts to meet the standards of general jurisdiction); *Noonan v. Winston Co.*, 135 F.3d 85, 92-93 (lst Cir. 1998) (general jurisdiction did not exist where foreign company solicited business in the forum, and visited the forum to establish business relationships and negotiate orders); *Cascade Steel Rolling Mills v. C. Itoh & Co.*, 499 F. Supp. 829, 841 (D. Or. 1980) (denying jurisdiction over Japanese steel company whose employees made isolated visits to the U.S. on matters unrelated to the antitrust claim); *accord* Philip E. Areeda & Hebert Hovenkamp, IA *Antitrust Law* ¶ 271c, c2, at 340, 342 (2d ed. 2000) (citations omitted) (a few meetings, isolated visits, attendance at trade association meetings (at least when not related to the litigation's subject matter), sponsorship of national advertising, and purchase of American parts by a foreign corporation are insufficient contacts for personal jurisdiction).

Second, the manufacturing of vehicles in Canada destined for eventual distribution in the United States (through intermediate sales) does not add enough to sustain general jurisdiction: the defendants' manufacturing operations are not within the forum.

Finally, being a party to an American lawsuit unrelated to this lawsuit cannot be considered a continuous or systematic activity. *See Donatelli*, 893 F.2d at 463 (citations omitted) (single isolated activities insufficient); *Swiss Am. Bank*, 274 F.3d at 619 (even in combination with other contacts, being an appellant in a lawsuit in an American court insufficient to assert jurisdiction).

Because all the Canadian defendants lack the continuous and substantial contacts with the forum necessary to assert general jurisdiction, I turn to specific jurisdiction.

(2) Specific Jurisdiction

In order to sustain specific jurisdiction over these Canadian defendants, the plaintiffs must show first that (1) the defendants in question purposefully directed activities towards residents of the forum (here, the United States as a whole), and (2) the litigation results from injuries that arise out of or relate to those activities. *Burger King Corp.*, 471 U.S. at 472 (internal quotations and citations omitted) (14th amendment case). Second, these contacts must constitute "purposeful availment" of the benefits and protections afforded by the forum's laws. *Swiss Am. Bank*, 274 F.3d at 621. The cornerstones of purposeful availment are voluntariness and foreseeability of being haled into the forum's courts. *Sawtelle v. Farrell*, 70 F.3d 1381, 1391 (1st Cir. 1995) (citing *Ticketmaster-New York v. Alioto*, 26 F.3d 201, 207 (1st Cir. 1994)). *See also Burger King*, 471 U.S. at 475 (jurisdiction may not rest on the "unilateral activity of another party or third person"); *World-Wide Volkswagen*, 444 U.S. at 297 (for a court to assert jurisdiction, a defendant's conduct and connection with the forum must be such that it should reasonably anticipate being haled into court there).

Third, even where such contacts exist, I must examine reasonableness. I must consider: (1) the defendant's burden of appearing; (2) the forum's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the judicial system's interest in obtaining the most effective resolution of the controversy; and (5) the common interests of all sovereigns in promoting substantive social policies. *See Asahi*, 480 U.S. at 113-116 (citing *World-Wide Volkswagen*, 444 U.S. at 292). In addition, special concerns arise when dealing with foreign defendants who may face unique and serious burdens litigating in a foreign legal system. *Id.* at 113-116.

(a) CADA

The Canadian Automobile Dealers Association ("CADA") is a not-for-profit organization that represents, promotes and protects the interests of franchised automobile dealers in Canada. Gauthier Decl. ¶¶ 1-4 (Docket Item #67). CADA does not sell or lease vehicles in the United States or Canada. *Id.* ¶ 7. The consumers allege that CADA issued an August 2002 report that describes a meeting with NADA where a "multi-faceted strategy was discussed" and "a consensus to work together" was reached to prevent new motor vehicle exports from Canada to the United States. Amended Compl. ¶ 68. The consumers assert that this CADA report claims that American and Canadian dealers and NADA "will cooperate wherever possible in assisting CADA with initiatives addressing export sales," and that representatives of the manufacturing defendants are pursuing "a united campaign against the unauthorized exporting of new vehicles into the U.S.A." *Id.* ¶¶ 69,71. Thus, the plaintiffs maintain that in its representative role, CADA supported certain activities and strategies designed to limit American consumers' ability to purchase or lease exported Canadian motor vehicles.[4] *See* Maier Aff., Exs. 10, 11; Gauthier Decl. ¶ 6.

The specific contact with the forum is CADA's attendance at a New York meeting in March 2002. CADA met with the National Automobile Dealers Association ("NADA") (representing American dealers) in New York on that date to discuss the "[e]xport sales issue," which it called "an issue of great concern to both associations." Maier Aff., Ex. 10 at 2; Gauthier Decl. ¶ 6. CADA documented its attendance and the topic of the meeting in both a newsletter

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[4] The industry refers to these export sales as "Grey Market Sales." *See* Maier Aff., Ex. 10 (Docket Item #75).

and memorandum.[5] Maier Aff., Exs. 10, 11. CADA made this contact voluntarily and deliberately, not through a third party. CADA "deliberately 'reach[ed] out beyond' [Canada] and negotiated with [an American] corporation. . . ." Burger King, 471 U.S. at 479. Although it was a single meeting in the United States on this topic, the plaintiffs allege that CADA participated in the conspiracy to withhold Canadian vehicles from the American market through precisely this type of informational meeting, *see* Amended Compl. ¶ 5, and that at this New York meeting CADA "made it clear to the NADA representatives that CADA would in no way support known exporters. . . ." Maier Aff., CADA Newsletter, Ex. 10 at 2. Accepting this evidence as true solely for the purposes of jurisdictional analysis, one can infer CADA's statement to be an *agreement* made in New York to help withhold Canadian vehicles from the American market. That is sufficient to make a *prima facie* showing of personal jurisdiction. This was significant activity in the United States that related to this litigation. This litigation results from alleged injuries that "arise out of or relate to" this activity. "[P]arties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state'" are subject to jurisdiction. *See Burger King*, 471 U.S. at 473. Under *Burger King*, when contact with the forum is related to the cause of action, as here, jurisdiction is more readily granted. Areeda & Hovenkamp, IA *Antitrust Law* ¶ 271c, at 340 (citing *Burger King*).

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[5] On January 16, 2002, a CADA representative also attended a meeting with the Resource Dealers Group in Chicago regarding Canadian automobile warranties. Gauthier Decl. ¶ 6. The plaintiffs, however, have not proffered any evidence that the meeting's topic was grey market warranties in general or, specifically, the refusal to honor Canadian warranties in the United States.

In assessing the reasonableness factors (called the gestalt factors in the First Circuit, *Sawtelle*, 70 F.2d at 1394), I conclude that the extent of the burden on CADA to litigate in the United States falls short of reaching constitutional significance. Although defending in a foreign jurisdiction always presents some measure of inconvenience, *accord id.* at 1395 (citing *Pritzker v. Yari*, 42 F.3d 53, 64 (1st Cir. 1994)), CADA regularly participates in meetings, conventions and symposiums in the United States. *See* Gauthier Decl. ¶ 6. American courts clearly have an interest in adjudicating the antitrust injury that the plaintiffs allege, and the plaintiffs should be afforded deference in choosing to press their claims in American courts, *see Sawtelle*, 70 F.3d at 1395 (citations omitted). The United States has attempted to provide a convenient forum for its residents to redress injuries of the foreign defendants. The Multi-District Panel chose to transfer these cases to Maine because I have the time and experience to oversee this litigation, and because Maine is a convenient forum due to its proximity to Canada. Transfer Order at 2 (Docket Item # 1). The interest of the judicial system in the effective administration of justice does not appear to cut in either direction here. *See Ticketmaster*, 26 F.3d at 211. One substantive social policy to consider, *see Asahi*, 480 U.S. at 115, might be the appropriateness of application of American antitrust laws to foreign corporations, but that issue has not been raised by the parties in discussion of the jurisdictional calculus.

After considering the relatedness of CADA's activities for the underlying claim, the deliberateness of its conduct and the reasonableness of the exercise of jurisdiction, I **DENY** CADA's motion to dismiss for lack of personal jurisdiction.

(b) Canadian Manufacturers/Distributors

The manufacture, distribution and sale of a particular brand of motor vehicles on a worldwide basis typically involve many corporate entities. The plaintiffs assert that the

enterprise is nevertheless integrated in each brand and that a court should not be diverted in the personal jurisdiction analysis by limiting itself to the contacts of a singular corporate defendant.[6] They point to websites where various de-

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[6] Despite the economic realities, I do not treat the corporate activities of the intricate corporate structures present in this case as unified action by parents and subsidiaries. I also do not uphold general jurisdiction on this basis over any Canadian defendant, each of them a corporate subsidiary, because a subsidiary does not achieve continuous and systematic contacts with the United States solely by having a parent company located in the United States. *See Saraceno v. S.C. Johnson and Son, Inc.*, 83 F.R.D. 65, 67 (S.D.N.Y. 1979) (citing *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925)); *Henry v. Offshore Drilling (W.A.) Pty., Ltd.*, 311 F. Supp. 340, 342 (E.D. La. 1971). However, I am troubled by the fact that the corporate websites of these automobile manufacturers and distributors go out of their way to describe the global nature and interconnectedness of the various subsidiaries, *see* n. 7, *infra*. Unwittingly, they make a strong case for the recent conclusions by some commentators and courts, that continuing to observe the corporate forms for personal jurisdiction purposes is blinking today's economic reality. *See, e.g., In re Tamoxifen Citrate Antitrust Litig.*, 262 F. Supp. 2d 17, 22-23 (E.D.N.Y. 2003) (citing *Waldron v. British Petroleum Co., Ltd.*, 149 F. Supp. 830, 834-35 (S.D.N.Y. 1957)); Lea Brilmayer and Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Calif. L. Rev. 1, 6 (1986) (stating that courts are giving approving attention to the argument that substantive legal relationships with a party may be automatically sufficient to establish jurisdiction). *See also Scophony*, 333 U.S. at 808 (stating that "practical, business conceptions" should be substituted for "hair-splitting legal technicalities"). The First Circuit's parsimonious view of parent-subsidiary relationships, *see, e.g., United*

[Footnote continued on next page]

fendants boast of the worldwide nature of their operations and the integration of their activities.[7]

The plaintiffs also assert that at least some of these Canadian defendants have purposefully engaged in a two-channel distribution system by which vehicles they manufac-

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[Footnote continued from previous page]

Elec., 960 F.2d at 1092-93 (requiring proof of lack of corporate independence, fraudulent intent and manifest injustice before the corporate unit will be ignored), may be ripe for re-examination, particularly in light of the expansive statements these defendants make about North American and global operations, which may indicate they should have fair notice of suit in the United States. Recognizing the close relationship between parents and their subsidiaries (especially in this case) for jurisdictional purposes would also be consistent with the liability rule that, due to a complete unity of interest, the coordinated activity of a parent and its wholly owned subsidiary cannot be considered a conspiracy and must be viewed as that of a single enterprise. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-72 (1984).

[7] *See, e.g.*, Maier Aff., Ex. 3 (website calling DaimlerChrysler AG "a new global transportation enterprise" and noting that DaimlerChrysler's Canadian production facilities build vehicles for the Canadian and United States markets), Ex. 7 (website noting that Toyota Motor Manufacturing Canada exports to the United States and Mexico), Ex. 8 (website stating that the "many sides" of Nissan are reflected in "13 distinct affiliates in North America"), Ex. 19 (website indicating that DaimlerChrysler is "a truly global company" with a "global workforce, a global shareholder base, globally known brands, and a global outlook") and Ex. 20 (website stating that Daimler Canada makes "large-scale shipments to the United States" and "continued to supply North America and the world with well-known products").

ture flow into the United States, through their parent or related companies, at higher prices; while the same vehicles, distributed in Canada at lower prices, are forbidden export to the United States.[8] (This is the lost discount distribution channel that is the basis of the plaintiffs' antitrust complaint.) This activity (sending higher priced vehicles while withholding lower priced vehicles), they say, is "purposefully directed" at American consumers, and their lawsuit "arises out of or relates to" these arrangements. *See Burger King*, 471 U.S. at 472-73 (internal citations omitted). The defendants, on the other hand, argue that in a constitutional analysis a court should respect the corporate formalities and look at only the contacts of the particular corporate defendant sued, not concern itself with what corporate parents, subsidiaries or siblings may have done.

On this motion, I am dealing with Canadian corporate defendants who are not themselves the parent companies.

(i) Daimler Canada

Daimler Canada manufactures motor vehicles in Canada and sells them to DaimlerChrysler Motors Co., LLC ("Daim-

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[8] In most cases, personal jurisdiction attaches because items are put directly into forums' streams of commerce. In this case, the focus of the complaint is that items are withheld. Although companies can withhold items to avoid being subject to jurisdiction, *cf. Burger King*, 471 U.S. at 472 (citing *World-Wide Volkswagen*, 444 U.S. at 297); *Lerfald v. Gen. Motors Corp.*, Ct. File No. CT 03-003327 (Minn. Dist. Ct. Nov. 7, 2003) (slip op.), at 13, withholding some while sending others may constitute activity directed toward a forum that is sufficient to sustain specific jurisdiction.

ler Motors"), its corporate grandparent.[9] Daimler Canada's Mot. to Dismiss, Fenn Aff. ¶ 8 (Docket Item #52). Daimler Motors purchases and takes title to those vehicles in Canada, and then imports them into the United States. *Id.* (These are the higher priced vehicles.) Daimler Canada's website states that Daimler Canada manufactures vehicles for both the American and Canadian markets, and in addition manufactures some vehicles solely for United States distribution. Maier Aff., Ex. 3. *See also id.*, Ex. 20.

In addition, the evidence shows that Canadian DaimlerChrysler dealers enter into non-export agreements with their consumers. *See id.*, Ex. 14. Purchasers sign these non-export agreements warranting that the vehicle they buy is for use in Canada and not for export. *Id.* They must agree not to export the vehicle from Canada or enter into an agreement whereby the vehicle is leased or sold for use outside of Canada. *Id.* (These are the lower priced vehicles.) On March 1, 2002, Daimler Motors sent a notice to dealers on both sides of the border that vehicle distribution outside the "dealer network" was unacceptable and that Daimler Canada would not provide warranty coverage for vehicles exported from Canada to the United States. *Id.*, Ex. 15. *See also id.*, Ex. 16.

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[9] DaimlerChrysler AG is the parent company of DaimlerChrysler North America Holding Corporation. Daimler Motors is a subsidiary of DaimlerChrysler North America Holding Corporation, and the parent company of DaimlerChrysler Corporation who in turn is the parent company of Daimler Canada. Mercedes-Benz Canada and Mercedes-Benz USA are also subsidiaries of DaimlerChrysler North America Holding Corporation. I am unclear where Mercedes-Benz of North America falls in the corporate structure.

This evidence of targeted distribution and non-export agreements to ensure that only the higher priced version of the same product can be sold to American consumers meets the standard for personal jurisdiction described in *World-Wide Volkswagen*. There, the Supreme Court held that if the sale of a manufacturer's or distributor's product is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly a geographic market, it is not unreasonable to subject the manufacturer or distributor to suit if its merchandise has there been the source of alleged injury. *See World-Wide Volkswagen*, 444 U.S. at 297-98. Daimler Canada has purposefully directed activities toward residents of the United States and this lawsuit arises from economic injuries that arise out of or relate to those activities.

In addition, the gestalt factors align in favor of finding jurisdiction over Daimler Canada. Daimler Canada manufactures vehicles in Canada that are eventually exported to the United States market, and its "center of gravity" is not "located at an appreciable distance from the forum." *Ticketmaster*, 26 F.3d at 210. The forum's interest in adjudicating the dispute, the plaintiffs' interest in obtaining convenient and effective relief, the judicial system's interest in obtaining the most effective resolution of the controversy, and the common interests of all sovereigns in promoting substantive social policies are the same as those I discussed in the CADA analysis, or perhaps stronger in favor of jurisdiction.

Here, the evidence for *prima facie* jurisdictional purposes is sufficient to show that Daimler Canada engaged in a two-fold distribution system directed at American consumers. This arrangement is more than mere product placement into the stream of commerce; this Canadian defendant, as evidenced by websites and sales, clearly anticipates that the vehicles it manufactures will be sold in the United States, and it controls the distribution system of Canadian manufactured

vehicles so as to avoid competing with those American sales. *See Asahi*, 480 U.S. at 112-13. I therefore DENY Daimler Canada's motion to dismiss for lack of personal jurisdiction.

(ii) Toyota Canada

Like Daimler Canada, Toyota Canada distributes vehicles in Canada that are the subject of non-export agreements between Canadian dealers and their customers. Maier Aff., Ex. 13. But non-export agreements alone do not furnish a sufficient basis for specific jurisdiction; Canadian distributors are allowed to put limits on their product placement so as to avoid suit in the United States. *See Burger King*, 471 U.S. at 472 (citing *World-Wide Volkswagen*, 444 U.S. at 297). The plaintiffs also need to show that Toyota Canada purposefully directed activities toward residents of the forum and purposefully availed itself of the forum's benefits and protections. "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Id.* at 474-75 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1953)). To that end, the plaintiffs assert that Toyota Canada manufactures vehicles in Canada and exports them to the United States, *see* Maier Aff., Exs. 2, 7. But they provide no competent evidence to support that assertion. Toyota Canada does purchase vehicles from manufacturing plants in the United States, but it does not manufacture vehicles or sell vehicles (directly or indirectly) for American distribution. Toyota Canada's Mot. to Dismiss, Nichols Decl. ¶¶ 6, 8, 20 (Docket Item #50). The plaintiffs provide evidence that "Toyota" and "Toyota Motor Manufacturing Canada" manufacture vehicles in Canada for export to the United States, Maier Aff., Exs. 2, 7, but they do not provide any evidence that either of these two companies is actually Toyota Canada (or one of its divisions). Instead, Toyota Canada presents uncontradicted evidence that it does not manufacture vehicles in Canada or sell

vehicles for distribution in the United States. Nichols Decl. ¶¶ 6, 8. In fact, Toyota Canada states that Toyota Motor Manufacturing Canada, Inc. is a distinct corporation from Toyota Canada and is not a party to this litigation. Defs.' Joint Reply Mem. at 11 and n.15 (Docket Item #82) (citing http://www.toyota.com/about/operations/na-affiliates /index.html). In short, the plaintiffs have failed to show on even a *prima facie* basis that Toyota Canada has engaged in a two-fold distribution system purposefully directed toward the American market that would support personal jurisdiction. Unless personal jurisdiction can be substantiated on the basis of co-conspirator activity, which I address later, Toyota Canada should be dismissed.

(iii) Nissan Canada and BMW Canada

There is no evidence that Nissan Canada or BMW Canada manufactures vehicles in Canada. They do obtain vehicles from manufacturing plants in the United States (BMW Canada through its parent company) for sole distribution in Canada. Nissan Canada's Mot. to Dismiss, Higgins Decl. ¶ 10 (Docket Item #54); BMW Canada's Mot. to Dismiss, Neville Aff. ¶ 20 (Docket Item #58). But Nissan Canada and BMW Canada are not manufacturers or sellers to the United States that can control the pricing and flow of vehicles in both the United States and Canada. The plaintiffs provide no evidence that Nissan Canada requires its dealers to use non-export agreements. BMW Canada does distribute vehicles in Canada that are subject to non-export agreements between dealers and their consumers. Maier Aff., Ex. 12. But as I said in the Toyota Canada analysis, distributing vehicles in Canada and even controlling that distribution through non-export agreements are alone insufficient to give defendants "fair warning" that they might be sued in the United States. *See Burger King*, 471 U.S. at 472 (citing *World-Wide Volkswagen*, 444 U.S. at 297) (noting that defendants can structure conduct with some minimum assurance as to where that con-

duct will and will not render them liable to suit). Unless personal jurisdiction can be sustained on the basis of co-conspirator activity, addressed later, Nissan Canada's and BMW Canada's motions to dismiss for lack of personal jurisdiction should be granted.

(iv) Mercedes-Benz Canada

Like Toyota Canada, Nissan Canada and BMW Canada, Mercedes-Benz Canada does not manufacture vehicles in Canada. Instead, it obtains vehicles from manufacturing plants in the United States (through its parent company) for sole distribution in Canada. Mercedes-Benz Canada's Mot. to Dismiss, Leigh Aff. ¶ 9 (Docket Item #53). Mercedes-Benz Canada does occasionally sell vehicles in Canada to Mercedes-Benz USA, the exclusive distributor of vehicles into the United States. Mercedes-Benz Canada's Mot. to Dismiss at 3 n.5; Leigh Aff. ¶ 2. These sales account for less than 0.5 percent of Mercedes-Benz Canada's yearly revenue. *Id.* Is this evidence of a dual distribution channel? The plaintiffs have not provided evidence that Mercedes-Benz Canada requires Canadian dealers to sign non-export agreements limiting the use of vehicles outside of Canada; only that Mercedes-Benz of North America, Inc. signs non-export agreements with North American dealers prohibiting use and export outside of North America. Maier Aff., Ex. 14 at 2. I conclude that jurisdictional discovery is warranted, given the fact that Mercedes-Benz Canada does sell some vehicles for distribution in the United States. I therefore **DEFER** action on Mercedes-Benz Canada's 12(b)(2) motion to dismiss for lack of personal jurisdiction pending jurisdictional discovery on the scope of sales of Mercedes-Benz Canada vehicles into the American market (through Mercedes-Benz USA) and concerning the scope of Mercedes-Benz non-export agreements for Canadian vehicles.

(c) The Conspiracy Theory of Jurisdiction

The plaintiffs have provided no evidence to support their allegation that Canadian defendants such as Nissan Canada, BMW Canada, Mercedes-Benz Canada and Toyota Canada were present at the March 2002 New York meeting that discussed the export sales issue.[10] Thus, the only remaining basis for maintaining jurisdiction over Nissan Canada, BMW Canada, Mercedes-Benz Canada or Toyota Canada is the so-called conspiracy theory of jurisdiction. Under this doctrine, the actions of one defendant are attributed to all the co-conspirators in assessing jurisdictional contacts. (Here, for example, CADA's involvement in the 2002 New York meeting would be attributable to all defendants.) However, the First Circuit has never recognized the conspiracy doctrine. *Glaros v. Perse*, 628 F.2d 679, 682 n.4 (1980) ("[W]e do not mean to imply that we would adopt [a] rather liberal approach to conspiracy pleading, or to decide that we would recognize a conspiracy theory of jurisdiction at all."). The Supreme Court has labeled the conspiracy doctrine in the venue context as having "all the earmarks of a frivolous albeit ingenious attempt to expand the statute." *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953). As one court has said, using conspiracy as a basis for personal jurisdiction is "[t]hat much more frivolous." *Kipperman v. McCone*, 422 F. Supp. 860, 873 (N.D. Cal. 1976). Another has said that "[t]he conspiracy theory of personal jurisdiction is being rejected by a growing number of courts." *Group Health Plan*

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[10] The plaintiffs allege that representatives of the manufacturing defendants attended the 2002 New York Auto Show meeting to discuss the export "problem." *See* Am. Compl. ¶ 66. However, there are no facts alleged with specificity that any of the Canadian defendants' representatives (other than CADA) were at the New York meeting. *See* Maier Aff., Exs. 10, 11.

v. Philip Morris, Inc., 1999 U.S. Dist. LEXIS 9640, *16 (D. Minn.). Additionally, scholars have been skeptical of the doctrine's conformance to notions of constitutional due process. *See, e.g.*, Ann Althouse, *The Use of Conspiracy Theory to Establish in Personam Jurisdiction: A Due Process Analysis*, 52 Fordham L. Rev. 234 (1983). *See also* Stuart M. Riback, Note, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 Colum. L. Rev. 506, 533 (1984) (noting that courts have rejected the conspiracy theory of venue virtually unanimously). For these reasons, I do not believe that the First Circuit would recognize a conspiracy theory of personal jurisdiction, whereby jurisdiction can be obtained over nonresident defendants based upon the jurisdictional contacts of co-conspirators.

III. CONCLUSION

The motions to dismiss for lack of personal jurisdiction of the defendants Canadian Automobile Dealers Association and DaimlerChrysler Canada, Inc. are **DENIED**.

The motions to dismiss for lack of personal jurisdiction of defendants Nissan Canada, Inc.; BMW Canada, Inc.; and Toyota Canada, Inc. are **GRANTED**.

Action on Mercedes-Benz Canada's motion to dismiss for lack of personal jurisdiction is **DEFERRED** pending jurisdictional discovery.

The plaintiffs are allowed limited jurisdictional discovery to determine the scope of sales of Mercedes-Benz Canada vehicles into the American market through Mercedes-Benz USA, whether Mercedes-Benz Canada, Inc. has non-export arrangements with Canadian dealers, and whether Canadian Mercedes-Benz dealers have non-export arrangements with their customers. The Magistrate Judge shall convene a conference of counsel to establish a schedule for this discovery.

SO ORDERED.

DATED THIS 4TH DAY OF MARCH, 2004.

/s/D. BROCK HORNBY
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

[Service List Omitted]

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

IN RE NEW MOTOR VEHICLES CANADIAN EXPORT ANTITRUST LITIGATION	]]]]	MDL Docket No. 1532

ORDER ON JOINT MOTION TO AMEND ORDER TO CERTIFY FOR INTERLOCUTORY APPELLATE REVIEW

The motion of the defendants DiamlerChrysler Canada, Inc. and Mercedes-Benz Canada, Inc. is **GRANTED IN PART**[1] as follows.

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[1] I grant the motion only because I understand that a 28 U.S.C. § 1292(b) appeal does not stay proceedings in this court, *see id.*, and because of these defendants' commitment that if their appeal is unsuccessful they will "accept the outcome of any rulings litigated in this matter . . . regardless of their participation (or lack thereof) in those proceedings." Mot. to Amend at 4. I intend to hold them to that commitment. But for that commitment, I would not grant the motion, for if they are unsuccessful on their appeal and can later relitigate matters resolved while they are pressing their appeal, it would wreak havoc on the progress of this complex multi-district proceeding.

My Order of March 4, 2004, is **AMENDED** to add the following two paragraphs:

A. This Order involves a controlling question of law as to which there is substantial ground for difference of opinion. Specifically, my conclusion that Clayton Act § 12 permits worldwide service of process upon alien corporate defendants in antitrust cases is the subject of disagreement among the Circuits. The First Circuit has not addressed the issue. The other issues these defendants raise, however, do not meet that standard.

B. An immediate appeal from the Order of March 4, 2004, will not materially advance the ultimate termination of the complex multidistrict litigation now before this court. It may, however, materially advance its termination as to these two Canadian parties, because if they are successful on their appeal of this issue, the litigation will terminate as to them. I conclude that the latter eventuality satisfies the requirement of 28 U.S.C. § 1292(b).

SO ORDERED.

DATED THIS 20TH OF APRIL, 2004.

/s/ D. BROCK HORNBY
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

[Service List Omitted]

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

IN RE NEW MOTOR VEHICLES CANADIAN EXPORT ANTITRUST LITIGATION	]]]]	MDL Docket No. 1532

ORDER ON CERTAIN DEFENDANTS' MOTION TO DECLINE SUPPLEMENTAL SUBJECT-MATTER JURISDICTION AND TO DISMISS FOR LACK OF PERSONAL JURISDICTION OVER STATE CLAIMS

I ruled previously in this lawsuit that retail purchasers and lessees can pursue a federal antitrust claim against motor vehicle manufacturers for injunctive relief, but not damages. *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 307 F. Supp.2d 136, 137 (D. Me. 2004).[1] The plaintiffs then amended their complaint to add various state law claims that would allow a monetary recovery. Some, but not all, of the defendant manufacturers[2] moved to dismiss the state law

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[1] *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746-47 (1977), forecloses a federal antitrust damage remedy to indirect purchasers.

[2] Honda Canada, Inc.; DaimlerChrysler Canada, Inc.; Mercedes-Benz Canada, Inc.; and the Canadian Automobile Dealers' Association ("CADA") ask that I require an independent state-law basis

[Footnote continued on next page]

claims for lack of personal jurisdiction, or on the basis that I should decline supplemental subject matter jurisdiction over the state law claims. After hearing oral argument on August 25, 2004, I conclude, first, that existing personal jurisdiction arising from the federal claim gives me jurisdiction to hear the state law claims (so-called pendent personal jurisdiction). I conclude, second, that I should not decline supplemental subject matter jurisdiction over the state law claims although I have the statutory discretion to do so. The motion to dismiss is therefore **DENIED**.

I. ANALYSIS

(A) Pendent Personal Jurisdiction

When a federal court has jurisdiction over a defendant for a federal claim, pendent personal jurisdiction allows the court to exercise personal jurisdiction as to state law claims based on the same operative facts as the federal claim, even if the state law claims do not themselves provide a basis for personal jurisdiction. *Action Embroidery Corp. v. Atl. Em-*

[Footnote continued from previous page]

(not present here) for asserting personal jurisdiction on the state-law claims. DaimlerChrysler Canada, Inc.; Mercedes-Benz Canada, Inc.; and CADA substantively challenge the adoption of pendent personal jurisdiction. American Honda Motor Co., Inc.; Honda Canada, Inc.; DaimlerChrysler Corporation; DaimlerChrysler Motors Co., LLC; DaimlerChrysler Canada, Inc.; Mercedes-Benz USA, LLC; and Mercedes-Benz Canada, Inc. all argue that even if personal jurisdiction exists, I should decline supplemental jurisdiction over the state-law claims. The following defendants support this Court's jurisdiction: General Motors Corporation; General Motors of Canada, Ltd.; Ford Motor Company; Ford Motor Company of Canada, Ltd.; Toyota Motor Sales, USA, Inc.; Nissan North America, Inc.; and BMW of North America, LLC.

broidery, Inc., 368 F.3d 1174, 1180 (9th Cir. 2004) (citations omitted). The Second, Third, Fourth, Seventh, Ninth, Tenth, and D.C. Circuits have all recognized pendent personal jurisdiction explicitly. *See IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056-57 (2d Cir. 1993); *Robinson v. Penn Cent. Co.*, 484 F.2d 553, 555-56 (3d Cir. 1973); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 628-29 (4th Cir. 1997); *Robinson Eng'g Co. Pension Plan and Trust v. George*, 223 F.3d 445, 449-50 (7th Cir. 2000); *Action Embroidery*, 368 F.3d at 1181; *United States v. Botefuhr*, 309 F.3d 1263, 1272-75 (10th Cir. 2002); *Oetiker v. Jurid Werke, G.m.b.H.*, 556 F.2d 1, 5 (D.C. Cir. 1977). Quoting the Tenth Circuit, the Ninth Circuit observed in 2004 that "every circuit court of appeals to address the question [has] upheld the application of pendent personal jurisdiction." *Action Embroidery*, 368 F.3d at 1181 (quoting *Botefuhr*, 309 F.3d at 1273). I recognized pendent personal jurisdiction in this District in 2000. *Andrews v. Emerald Green Pension Fund*, 2000 U.S. Dist. LEXIS 14545, at *23-24 (D. Me. Sept. 27, 2000). Once again, I conclude that the First Circuit will recognize pendent personal jurisdiction, agreeing with the other seven Circuits that have addressed the issue.

In an earlier ruling, I found personal jurisdiction over certain Canadian defendants on the federal antitrust claim that motor vehicle manufacturers had conspired to avoid price competition by keeping Canadian motor vehicles out of the American market, *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 307 F. Supp.2d 145, 147 (D. Me. 2004). In a Second Amended Complaint, the plaintiffs have added state law claims under state antitrust statutes, consumer protection statutes and the common law of unjust enrichment. The new claims arise out of the same underlying facts (the asserted conspiracy to avoid price competition) as those supporting the federal claim. (In adding the state claims the plaintiffs did not significantly alter the factual allegations of their complaint.) Therefore, pendent personal jurisdiction

provides jurisdiction over these same defendants for the state law claims, because they arise out of the same nucleus of operative facts. *Action Embroidery*, 368 F.3d at 1180.

To be sure, Circuits that recognize pendent personal jurisdiction also say that the district court has discretion not to assert the jurisdiction. *See, e.g.*, *Action Embroidery*, 368 F.3d at 1181 (quoting *Oetiker*, 556 F.2d at 5 ("[T]he district court may have discretion to dismiss the pendent claims where considerations of judicial economy, convenience and fairness to the litigants so dictate.")). For the reasons I articulate below in discussing the discretionary decision over supplemental subject matter jurisdiction, I conclude that asserting jurisdiction here is a proper exercise of discretion. "[I]t is often reasonable to compel [a] defendant to answer other claims in the same suit arising out of a common nucleus of operative facts." *Action Embroidery*, 368 F.3d at 1181. Here, it is in the interest of "judicial economy, avoidance of piecemeal litigation, and overall convenience of the parties." *Id.*

Contrary to the defendants' argument, I conclude that the existence of personal jurisdiction as to the federal antitrust claim satisfies constitutional due process requirements for personal jurisdiction as to the state law claims as well. *See id.*; *ESAB*, 126 F.3d at 628-29. Where the federal and state law claims arise out of the same nucleus of operative facts, "according to the weight of authority, due process would not prevent obliging the defendant to defend against the state claim along with the federal claim under the doctrine of pendent personal jurisdiction." 4A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1069.7 at

228-29 (3d ed. 2002).[3] The defendants argue that their case is unique: that for the state law claims, the plaintiffs can obtain personal jurisdiction over these defendants in *no* state forum in the United States[4] and therefore should not be permitted to pursue their state claims in this federal court. I do not understand why that argument should succeed.[5] As the Fourth Circuit said in *ESAB*,

> Once a court has a constitutional case, in the Article III sense, properly before it, service by a court sufficient to assert personal jurisdiction over a defendant by any authorized mechanism consistent with due process may be held to apply to the entire constitutional

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[3] "Thus, a defendant who already is before the district court to defend a federal claim is unlikely to be severely inconvenienced by being forced to defend a state claim whose issues are nearly identical or substantially overlap. Notions of fairness simply are not offended in this circumstance." 4B Wright & Miller, *supra*, § 1117 at 189. To the degree that there is a need to consider the fairness of the forum, *see generally* 4 Wright & Miller, *supra*, § 1068.1, I observe that the Judicial Panel on Multidistrict Litigation's action in consolidating all the lawsuits and transferring them to Maine, a jurisdiction immediately adjacent to Canada, operated to reduce the burden on the Canadian defendants.

[4] It became apparent at oral argument that the plaintiffs do not agree with this assertion.

[5] For example, a plaintiff may obtain personal jurisdiction over a defendant in Mississippi state court to assert a claim based upon Arkansas law, even though he could not obtain personal jurisdiction in Arkansas. I do not see why it should matter that the personal jurisdiction is obtained in a federal court instead of a state court.

> case. . . . Since the court has personal jurisdiction over the defendants . . ., we can find no constitutional bar to requiring the defendants to defend the entire constitutional case, which includes both federal and state claims arising from the same nucleus of facts, so long as the federal claim is not wholly immaterial or insubstantial.

126 F.3d at 628-29.

Nevertheless, certain defendants argue that the First Circuit will not accept pendent personal jurisdiction because of its holding in *Moreno v. United States*, 120 F.2d 128 (1st Cir. 1941). In *Moreno*, a widow sued the government in federal court in Massachusetts, seeking benefits under a war risk insurance policy insuring her deceased husband. *Id.* at 129. Section 19 of the World War Veterans' Act, 1924, permitted the United States to implead into such a lawsuit anyone else claiming an interest in the insurance policy, regardless of where he or she lived. Accordingly, the government impleaded the policy's named beneficiary, a woman who lived in New Jersey. Subsequently, the plaintiff widow tried to add a direct claim for damages against the New Jersey resident for alienation of affections. Both the district court and the First Circuit held that she could not. *Id.* at 130.

The pendent state claim the plaintiff sought to raise in *Moreno* (alienation of affections) was *not* related to the underlying federal claim (entitlement to benefits under a government insurance policy). Pendent personal jurisdiction exists when the state claims for which there is no independent basis for jurisdiction and the federal claim for which there is personal jurisdiction *do* "arise[] out of a common nucleus of operative facts." *See Action Embroidery*, 368 F.3d at 1180 (citations omitted). Thus, the 1941 *Moreno* decision is not inconsistent with the later recognized doctrine of pendent personal jurisdiction. *Accord Amtrol, Inc. v. Vent-Rite Valve*

Corp., 646 F. Supp. 1168, 1174 n.4 (D. Mass. 1986) (distinguishing *Moreno* and applying doctrine of pendent personal jurisdiction); *Bertozzi v. King Louie Int'l, Inc.*, 420 F. Supp. 1166, 1172 n.3 (D.R.I. 1976) (adopting narrow interpretation of *Moreno*). *But see Wilensky v. Standard Beryllium Corp.*, 228 F. Supp. 703, 706 (D. Mass. 1964).

Therefore, pendent personal jurisdiction permits jurisdiction over the Canadian defendants on the state law claims.

(B) Supplemental Subject Matter Jurisdiction

Because there is subject matter jurisdiction over the federal antitrust claim, 28 U.S.C. § 1367 also grants supplemental jurisdiction over "all other claims that are so related to [the federal claim] that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a) (1993). The state law claims meet that standard. Certain defendants argue, however, that I should decline supplemental subject matter jurisdiction over the state law claims. The statute provides: "[D]istrict courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the claim substantially predominates over the claim or claims over which the district court has original jurisdiction. . . ." 28 U.S.C. § 1367(c)(2). According to the First Circuit, this language accords a district court "'broad discretion.'" *Che v. Mass. Bay Transp. Auth.*, 342 F.3d 31, 37 (1st Cir. 2003) (quoting *Vera-Lozano v. Int'l Broad.*, 50 F.3d 67, 70 (1st Cir. 1995)). The focus is on "the totality of the circumstances" and consideration of issues such as "comity, judicial economy, convenience, fairness and the like." *Che*, 342 F.3d at 37 (*citing Roche v. John Hancock Mut. Life*

Ins. Co., 81 F.3d 249, 257 (1st Cir. 1996); *Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168, 1177 (1st Cir. 1995)).[6]

The defendants focus primarily on convenience and judicial economy. They argue that accepting jurisdiction will vastly complicate discovery, class certification issues and trial. They point out the need for proof of in-state effects for some state laws, but highlight especially the damage difficulties, asserting that my *Illinois Brick* ruling removed the damage remedy from the case as it was then structured, and that the new state law claims will restore damage issues, with difficult variations from state to state.

First, I conclude that the projected discovery difficulties will be manageable. State law discovery will go forward, at least as to some states, regardless of what I do on this motion, because there are parallel lawsuits pending in a number of state courts. Fortunately, the parties have been cooperating in efforts to coordinate discovery in this federal multidistrict lawsuit with that in the state court lawsuits. Already, a number of the state jurisdictions have entered orders coordi-

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[6] The Third Circuit is arguably stricter in limiting district judges' discretion to decline supplemental jurisdiction. It holds that the "substantially predominate" standard is "a limited exception to the operation of the doctrine of pendent jurisdiction—a doctrine that seeks to promote judicial economy, convenience, and fairness to litigants by litigating in one case all claims that arise out of the same nucleus of operative fact." *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 789 (3d Cir. 1995). Jurisdiction should be declined "only where there is an important countervailing interest to be served by relegating state claims to state court," "normally . . . the case only where 'a state claim constitutes the real body of a case, to which the federal claim is only an appendage.'" *Id.* (citation omitted).

nating their discovery procedures with the federal action. The addition of some discovery issues to this multidistrict litigation is not enough to reject the state law claims.

Second, I will deal with class certification issues when the case reaches that stage.[7]

Third, I do not find the asserted trial difficulties to be especially significant. Moreover, under current Supreme Court precedent, *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998), these cases will all return to the districts where they originated once pretrial proceedings are complete. Some of the state law variations, therefore, will be handled by judges familiar with local law.

Two additional observations. First, this is a multidistrict lawsuit. Such lawsuits are expected to be complex. The Judicial Panel on Multidistrict Litigation gathers lawsuits from around the country and transfers them to a district with time and resources to deal with that complexity. It would be unhelpful in such a context to reject claims on the basis of complexity. Second, it is true that my earlier *Illinois Brick* ruling eliminated damages as the lawsuit was then structured. I never expected damages to go away entirely, however. The plaintiffs' lawyers assured me at oral argument on that earlier motion that they would add parties to avoid *Illinois Brick* if I

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[7] I am puzzled by the defendants' reliance upon *Jones v. Ford Motor Credit Co.*, 358 F.3d 205 (2d Cir. 2004) in their Reply Mem. at 6 n.3. *Jones* stated that before a class has been certified "district courts should normally not dismiss the claims based solely on the problems that could arise if the class is eventually certified." *Id.* at 215 n.9 (emphasis added) (citation omitted). No class has yet been certified in this case. Moreover, *Jones* counseled the district judge to craft the class certification order to avoid the supplemental jurisdiction issue. *Id.* at 216.

ruled against them (as I did); I recognized that prediction in the decision itself. *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 307 F. Supp.2d at 138-41. Although the plaintiffs have chosen not to follow their predicted course, but to add state claims instead, I have always expected that this multidistrict lawsuit, if it proceeded, would have to deal with damages. I am surprised if any of the lawyers thought otherwise. Moreover, even if I had the unexpected luxury of dealing only with liability and injunctive relief, I am sure that in discovery and at trial the parties would be discussing numbers related to damages. After all, the whole premise of this lawsuit is that the defendants' conduct resulted in illegal price differentials between Canadian and American cars, and that American consumers had to pay extra. Even to secure injunctive relief, the plaintiffs presumably will be required to prove such facts, and the defendants presumably will be arguing that any price differentials would have existed regardless. Argument over the scope of any injunction could also lead to consideration of such issues.

Yes, it would be easier for this individual federal judge not to have to address a variety of state laws in resolving the recently filed motion to dismiss or, if the claims survive the motion to dismiss, in the inevitable summary judgment practice to come. But accepting a multidistrict case means recognizing the likelihood of dealing with other laws. After all, not all multidistrict cases are premised on federal question jurisdiction. (Indeed, one might expect that if these state law claims were individually filed in other districts or were filed in state court and removed to federal court on the basis of diversity of citizenship, the Multidistrict Panel would send them to this District in any event.)

In this case, all the claims, state and federal, derive from the same underlying factual assertions. The heart of the case is still the alleged antitrust violation. The state issues are not "more important, more complex, more time consuming to

resolve, or in any other way more significant than their federal counterparts." *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 790 (3d Cir. 1995), even though they make possible a wider remedy. *See In re Stat-Tech Secs. Litig.*, 905 F. Supp. 1416, 1426 (D. Colo. 1995) (asserting supplemental jurisdiction because "[w]hile state law may predominate in terms of the comprehensiveness of remedies sought on the remaining state law claims, all of the Trust's claims stem from the same alleged misconduct of defendants").

I conclude that this single coordinated and consolidated pretrial proceeding in the District of Maine best furthers convenience, fairness, judicial economy, and reduction of cost and expense for the parties. Federal-state comity has not been argued, but I observe that a number of the state courts with parallel lawsuits are joining the Consolidation Order that California Superior Court Judge Richard Kramer and I entered at the parties' joint request. I see no negative comity factors. In short, dealing with all the claims in the District of Maine furthers both the administration of justice and the goals of multidistrict litigation.[8]

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[8] The moving defendants claim that acceptance of jurisdiction over the state law claims that allow indirect purchasers to sue for damages violates federal policy against indirect purchaser suits and will lead to re-litigation of issues decided in my earlier order, *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 307 F. Supp.2d at 144. I disagree. The exercise of supplemental jurisdiction over the state claims does not violate federal policy against indirect purchaser suits for federal antitrust law or re-litigate issues decided in my previous order. *See California v. ARC Am. Corp.*, 490 U.S. 93, 103-05 (1989) (finding that state statutes allowing recovery for indirect purchasers do not interfere with federal policy or remedies and that federal courts may accept or decline supple-

[Footnote continued on next page]

In light of these considerations, I choose to exercise both supplemental jurisdiction over the newly-raised state-law claims and pendent personal jurisdiction over the moving defendants as to all state claims in the Second Amended Complaint.

III. CONCLUSION

The Motion to Decline Supplemental Subject-Matter Jurisdiction and to Dismiss for Lack of Personal Jurisdiction Over State-Law Claims is **DENIED**.

SO ORDERED.

DATED THIS 7TH DAY OF SEPTEMBER, 2004.

/s/D. BROCK HORNBY
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

[Service List Omitted]

[Footnote continued from previous page]

mental jurisdiction over state law indirect purchaser claims); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 275 (D. Mass. 2004).